IN THE

Supreme Court of the United States

OCTOBER TERM

No. 78-943

JOHN Q. THOMPSON,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN I. HEISE, JR.
861 Pershing Drive
Silver Spring, Maryland 20910
(301) 585-8400
Attorney for Petitioner

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Petitioner respectfully petitions that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review its judgment entered September 14, 1978, affirming the judgment of the United States District Court for the District of Columbia in favor of Respondent and dismissing the proceedings.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit is printed

as Appendix A, *infra.* The Memorandum and Order of the United States District Court for the District of Columbia is printed as Appendix B, *infra.* The decision of the United States Civil Service Commission Board of Appeals and Review is printed as Appendix C, *infra.* The decision of the United States Civil Service Commission, Dallas Region, Dallas, Texas, is printed as Appendix D, *infra.*

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia was filed September 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and the Rules of the Supreme Court of the United States Rule 19(1) (b).

QUESTIONS PRESENTED

1. Was the Petitioner prejudiced by the refusal of the United States Court of Appeals for the District of Columbia Circuit to apply as a standard of review whether the Agency's action in dismissing Petitioner was arbitrary and capricious when such standard of review is accepted by the United States Court of Claims in its review of Civil Service actions? As a corollary is such non-application by the U.S. Court of Appeals in conflict with the application by the Court of Claims?

2. Was the penalty of involuntary termination too harsh for those offenses which the Board of Appeals and Review of the Civil Service Commission determined were committed by Petitioner?

3. Did the use of ex-parte communications before the Board of Appeals and Review of the Civil Service Commission constitute a denial of Petitioner's right of procedural due process?

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 701

5 U.S.C. 706

5 U.S.C. 7501

STATEMENT OF THE CASE

This case involves the involuntary termination of a career, civil service employee from the Defense Contract Audit Agency, United States Department of Defense.

Petitioner, a licensed Certified Public Accountant, was employed by the Defense Contract Audit Agency (and its predecessor, the Navy Audit Office) from January 1963 to November 17, 1972. At the time of his involuntary termination, Petitioiner was a GS-510-12 supervisory auditor. In such supervisory capacity, he was responsible for review of defense contracts and served as Auditor-in-Charge of the E-Systems, Inc., Garland, Texas account. During his employment with the Defense Contract Audit Agency and its predecessor, the Navy Audit Office, Petitioner was promoted from GS-9 level to GS-12 and received all within grade increases. Petitioner received an additional increase in salary in 1969 for outstanding performance. He continually received oustanding and above average performance ratings throughout his period of employment until immediately prior to the termination proceedings.

On December 7, 1970, Petitioner was transferred to the Garland Division of Defense Contract Audit Agency, Gar-

land, Texas, to act as Supervisory auditor of a defense contractor, E-Systems, Inc.

Petitioner's duties at Garland involved supervision of government auditors with varied backgrounds, training and experience. Among other duties which Petitioner was responsible for was clearing a five year backlog of certain accounting operations at Garland. Petitioner's duties involved supervision of the auditors and in some cases actual audit and review of the accounting systems used by government and contractors and the spending of government funds in defense contracts. Millions of dollars of spending were reviewed.

On October 6, 1972, Petitioner received notification of his supervisor's proposal to terminate him, effective November 1972, for "failure to perform. . . duties in accordance with requirements." In support thereof, his supervisor cited four charges containing seventeen separate qualifications of Petitioner's alleged failure to satifactorily perform. The seventeen specifications cited by Petitioner's supervisor involved over 20 assignments. Petitioner replied to these charges and specifications. Nevertheless, on November 17, 1972, the agency discharged Petitioner.

The four charges against Petitioner centered about the following tasks:

1. Plan and perform audit functions;
2. Draft advisory report of audit functions;
3. As Auditor-in-Charge, direct the activities of auditor staff members who may be assigned to assist in the performance of the audit; and

4. Draft or is responsible for advisory reports of audit findings, conclusions and recommendations to procurement officials or contracting officers.

Petitioner appealed his involuntary termination to the Dallas Regional Office of the U.S. Civil Service Commission on November 30, 1972. In a detailed finding based on a review of the written record and without a hearing, the Appeals Examiner on April 24, 1973, sustained only one charge and only five out of the total of seventeen specifications cited as reason for Petitioner's termination. The Appeals Examiner in his report, however, stated:

> "In view of the above findings, and since we do not believe the removal action will improve the efficiency of the service, *the agency's action must be disapproved.* It is recommended that the appellant be retroactively restored to the position from which he was removed." Appendix D, page 64a (emphasis added).

On May 11, 1973, the Respondent agency appealed the decision of the Dallas Regional Office of the Civil Service Commission to the Board of Appeals and Review, Civil Service Commission, Washington, D.C. On February 24, 1973, the Board of Appeals and Review issued a finding reversing the decision of the Regional Office and withdrawing the corrective action of retroactive restitution. In its decision the Board of Appeals and Review sustained only six of the seventeen specifications cited by Petitioner's supervisor as reasons for termination. However, the Board found three of the four charges sustained. (Appendix C, page 30a).

The Board of Appeals and Review affirmed the Regional Appeals Examiner in not sustaining ten of the specifications. The Board of Appeals and Review and the Regional Hearing Examiner sustained four specifications and disagreed on three other specifications. The Board of Appeals and Review sustained two specifications which the Regional Appeals Exam-

iner had not done, and failed to sustain one specification which the Regional Appeals Examiner had sustained.

In reversing the decision of the Regional Appeals Examiner, the Board of Appeals and Review sustained two additional specifications over and above the four sustained by both the Board of Appeals and Review and the Regional Appeals Examiner.

Within the framework of these two additional specifications, the Board of Appeals and Review went on to sustain two additional charges; charges one and three, while affirming the Regional Appeals Examiner in sustaining charge two. The two additional specifications by the Board of Appeals and Review were specifications 1(b)(1) and 3(b)(2) (identified in Appendix D hereto). Specification 1(b)(1) involved assignment 2105.2003, Incentive Price Redetermination. The Regional Appeals Examiner found that since the improper contracts were cited in support of this specification that Petition *was not afforded a reasonable opportunity* to answer the specification and thus the specification must fail (Appendix D, page 50a). The Board of Appeals and Review in reversing the finding of the Regional Appeals Examiner and sustaining the specification found that since Petitioner's reply indicated that he had knowledge of the correct contract number, the test of reasonable opportunity to reply was met (Appendix C, page 19a). Specification 3(b)(2) involved Assignment 3231.2011, Forward Pricing Rates, with Continental. The Regional Appeals Examiner did not sustain this specification finding that the Agency had not conclusively proved its case on this point (Appendix D, page 60a). The Board of Appeals and Review, however, sustained the specification on the basis of the evidence (Appendix C, page 28a).

On September 24, 1976, petitioner brought suit in the

United States District Court for the District of Columbia. On April 5, 1977, the Court entered summary judgment without a hearing in favor of respondent agency and dismissed Petitioner's case stating:

> "This Court cannot say that plaintiff has been denied any procedural rights or that the actions of DCAA and BAR have been arbitrary and capricious." Appendix B, page 12a.

On August 29, 1977, petitioner appealed to the U.S. Court of Appeals for the District of Columbia Circuit. On September 14, 1978, the Court of Appeals affirmed the District Court's judgment stating that:

> "He (the petitioner) has not demonstrated that the Board's determinations are procedurally infirm or substantively arbitrary or capricious." (explanation added). (Appendix A at page 9a).

From the decision of the U.S. Court of Appeals for the District of Columbia Circuit, the Petitioner hereby files this petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This case involves an important federal question which addresses that standard of judicial review which is to be applied when individuals are involuntarily terminated from federal employment. Petitioner as a career employee with the Defense Contract Audit Agency, United States Department of Defense, had sufficient expectancy of continued employment, absent incompetency or misconduct, to constitute a protected property interest. After his dismissal Petitioner sought relief through the Regional Division of the Civil Service Commission and there he prevailed. Respondent

(Agency) thereafter prevailed in its appeal to the Board of Appeals and Review. Petitioner's subsequent appeal to the United States District Court for the District of Columbia was dismissed on Respondent's Motion for Summary Judgment. The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court.

A. There is Conflict between the Standard of Judicial Review of a Civil Service Dismissal Applied by the United States Court of Appeals for the District of Columbia Circuit and That Applied in the United States Court of Claims.

Under 5 U.S.C. Section 701, et seq. any person suffering legal wrong because of adverse agency action is entitled to judicial review of that adverse agency action. The scope of judicial review of such agency action, 5 U.S.C. Sec. 706 extends to actions found to be arbitrary or capricious, 5 U.S.C. Sec. 706(2)(A) and actions unsupported by substantial evidence, 5 U.S.C. Sec. 706(2)(E).

In affirming the judgment of the District Court, the United States Court of Appeals for the District of Columbia in the instant matter stated:

> "The scope of judicial review on the merits of a Civil Service discharge is narrow. As this court has explained, discretion primarily lies in the hands of the administrative agencies involved, and the courts will not substitute their own judgment for that of the agencies; *Gueory v. Hampton*, 167 U.S. App. D.C. 1, 4, 510 F.2d 1222, 1225 (1974).

> We may determine only whether the decision to remove the employee was arbitrary and capricious. *Meehan v. Macy*, 129 U.S. App. D.C. 217, 225, 392 F.2d 822, 830 (1968) on rehearing, 138 U.S. App. D.C. 41, 425 F.2d 472 (1969), for we do not sit as ombudsmen for government employee relations, *Doe v. Hampton*, 184 U.S. App. D.C. 373, 379, 566 F.2d 265, 271 (1977). These precepts compel affirmance in the instance case." (Appendix A, page 6a).

In a footnote to the above judgment the Court of Appeals stated:

> "Whatever the arbitrary or capricious standard might imply about requisite evidentiary support, see *Doe v. Hampton, supra* note 19, 184 U.S. App. D.C. at 379-380 n. 15, 477 F.2d at 271-272 n. 15, the action challenged herein is supported by substantial evidence." (Appendix A, page 7a, footnote 20).

The standard of judicial review of the involuntary termination of civil servants expressed by the United States Court of Appeals for the District of Columbia Circuit is limited to reviewing the merits to determine only if there is substantial evidence from the facts alleged to show incompetence or misconduct on the part of the employee in order to support the agency decision. As indicated in the footnote to its opinion in the instant matter and in prior cases, if there is substantial evidence to support the decision of the agency in terminating the employee, the United States Court of Appeals for the District of Columbia will sustain the agency action.

The United States Court of Appeals for the District of

Columbia in *Polcover v. Secretary of the Treasury*, 155 U.S. App. D.C. 338, 477 F.2d 1223 (1973) expressed this standard of judicial review of dismissal as,

> "In other words, we conduct the identical review we are so often called upon to use in statutorily provided judicial review of other agency orders, e.g. F.C.C., N.L.R.B., F.T.C. The only difference is that in this instance our review follows identical review in the district court." 477 F.2d at 1227.

Following this decision the Court went on in *Gueory v. Hampton*, 167 U.S. App. D.C. 1, 510 F.2d at 1222 (1974) to elaborate their standard of review:

> "The question, therefore, for judicial review is whether those interpretative regulations are valid, and if so, whether appellee's conduct falls within the ambit of the regulation." 510 F.2d at 1225.

Summarizing the standard of judicial review the Court of Appeals noted in a footnote to *Doe v. Hampton*, 184 U.S. App. D.C. , 566 F.2d 265 (1977), footnote 15, cited by the court as controlling the instant matter:

> "It is still not completely clear what the appropriate formula should be, if any, for judicial review of the evidence supporting agency findings in adverse personnel actions. Earlier cases almost always characterized the scope of review as limited to assuring procedural compliance and applying the so-called arbitrary or capricious test. . .
>
> Although a finding that a decision is not "arbi-

> trary or capricious" clearly must rest upon a corollary finding that the relevant factors upon which the decision is assertedly based are supported by some evidence, see *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* this court and at least one other have described the appropriate scope of review as including both a determination of the rationality of the decision and of the evidentiary support for it, perhaps only for emphasis' sake. . .
>
> As a matter of practicability, it may not much matter how reviewing courts choose to label the tests they apply. Labels, experience tells us, seldom have much analytical utility and just as often may lead judges into a semantic Serbonian Bog. While an adverse action supported by substantial evidence of record may still be arbitrary and capricious, *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974), for instance if there is no rational connection between the grounds charged and the interest assertedly served by proceeding against the employee, see, e.g., *Norton v. Macy*, 135 U.S. App. D.C. 214, 417 F.2d 1161 (1969); *Mindel v. Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970); but see *Alsbury v. United States Postal Service, supra,* 503 F. 2d at 856 ("dismissal was supported by substantial evidence and thus was neither arbitrary nor capricious"), an action that is not arbitrary or capricious logically must have some if not substantial evidentiary support in the record. To require more evidence than would be sufficient for a decision to pass muster under the arbitrary or capricious test of 5 U.S.C., Section 706(2) (A) is, in effect, to invent a more gener-

> ous judicial review of these personnel matters than the reviewing courts are entitled to." 566 F.2d at 271, note 15.

As discussed above, the rational connection between the grounds charged and the interest assertedly served by proceeding against the employee is the nexus test used by the Court of Claims and the Court of Appeals in reviewing Civil Service adverse action proceedings. This "Nexus" test is an evidentiary review of data rationally supporting the decision of the Agency. This standard of review by the Court of Appeals for the District of Columbia, however, only involves evaluating the evidence considered by the agency in its decision and does not include scrutiny of the *manner in which* the agency action of dismissal was accomplished. Petitioner has contended throughout his administrative and judicial appeals that the action to terminate him was not based on an honest and fair judgment by agency officials.

The standard of judicial review applied by the United States Court of Appeals is only one segment of the judicial review standard applied in the United States Court of Claims in reviewing the involuntary dismissal of a federal employee under a claim for back salary. The United States Court of Claims reviews the merits of the case not only for substantial evidence to support the agency's decision but also to determine whether the agency's action in proceeding against the employee is arbitrary and capricious. Unlike the United States Court of Appeals for the District of Columbia, the United States Court of Claims goes beyond a review of the prior judicial and administrative findings to scrutinize agency action de novo for arbitrary or capricious action on the agency's part (when alleged) in dismissing the employee. Because of the location of the United States Court of Appeals for the District of Columbia, that tribunal, along with the United States Court of Claims, whose jurisdiction in these cases is statutory, are called upon to judicially review a great majority of civil service dismissals.

The standard of review of the United States Court of Claims where relief was granted the employee, was expressed in *Knotts v. United States,* 128 Ct. Cl. 489, 121 F. Supp. 630, 631 (1954).

> "In innumerable cases it has been held that where discretion is conferred on an administrative officer to render a decision, this decision must be honestly rendered, and that if it is arbitrary or capricious, or rendered in bad faith, the courts have power to review it and set it aside. This court has this question presented to it constantly in cases arising under Government contracts where the contracting officer and the head of the department are given the power to render final decisions on questions of fact. Both this Court and the Supreme Court have many times held that if the decision is arbitrary or capricious or so grossly erroneous as to imply bad faith, it will be set aside. See e.g. *Burchell v. Marsh*, 17 How. 344, 349; *Kihlberg v. United States,* 97 U.S. 398; *United States v. Gleason,* 175 U.S. 588, 602; *Ripley v. United States,* 223 U.S. 695, 701.
>
> The court will not substitute its judgment for that of the administrative officer, but the employee nevertheless has the right to the honest judgment of the administrative officer. If that officer does not render an honest judgment but acts arbitrary, capriciously or maliciously, then undoubtedly the rights of the employee have been violated."

In *T. Michael Smith v. United States*, 151 Ct. Cl. 205 (1960) the Court of Claims framed the questions presented for review as:

> "The questions presented are: (a) Were the actions of the Reconstruction Finance Corporation Officials in abolishing plaintiff's position, reassigning him to the same abolished position and then separating him in a reduction in force, arbitrary, capricious and in bad faith; (2) were any of the procedural requirements of the Veterans' Preference Act or of the regulations of the Civil Service Commission promulgated thereunder violated, making the civil service review improper because it was based upon a finding that plaintiff was '. . . considered for and made an offer of reassignment to another position * * *,' which statement was in error." 151 Ct. Cl. at 207.

The latest case where in applying this appropriate standard of judicial review, the Court of Claims has found the agency's action to be arbitrary or capricious is *Erdwein v. United States*, 206 Ct. Cl. , (October 1977) wherein the court stated:

> "Based on all the evidence, including the trial record, the trial judge concluded that the decision to remove plaintiff was arbitrary, capricious, and not supported by substantial evidence. *Giles v. United States*, 213 Ct. Cl. (slip op. at 3), 553 F. 2d 647, 649 (1977); *Urbina v. United States*, 209 Ct. Cl. 192, 530 F. 2d 1387 (1976); *Ciambelli v. United States*, 197 Ct. Cl. 542, 456 F. 2d 777 (1972). Upon our findings and conclusion, plaintiff is entitled to back pay for the period from his dismissal to the date of his death. 206 Ct. Cl. at

The standard of proper review by the United States Court of Claims of an involuntary termination was summarized in *Schlegal v. United States*, 189 Ct. Cl. 30, 35, 416 F. 2d 1372, 1375 (1969).

> "Before the specific issues in this case are discussed, the general guidelines for review by this court should be recognized. As we stated in *Morelli v. United States*, 177 Ct. Cl. 848, 858 (1966):
>
> The power of removal from office in the executive branch of the Federal Government, absent some specific provision to the contrary, is incident to the power of appointment. *Keim v. United States*, 177 U.S. 290, 293, 20 S. Ct. 574, 44, L. Ed. 744 (1900). Where an administrative agency has complied with the prescribed procedural requirements, the Court of Claims can only review the action to determine whether the officials who effected the dismissal acted arbitrarily, capriciously or were so grossly erroneous as to be in bad faith, as for instance where they may have acted without substantial evidence to support their decision or where they exceeded their authority. *Bayly v. United States*, 99 Ct. Cl. 598 (1943); *Love v. United States*, 119 Ct. Cl. 486, 493, 98 F. Supp. 770, 774 (1951), cert. denied, 342 U.S. 866, 72 S. Ct. 106, 96 L. Ed. 651.
>
> Thus, there are essentially two focal points which comprise our scope of review. One involves a consieration of regulations in effecting the employee's ultimate removal. *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957). The other concerns the question of whether the

> employee's removal was accomplished in an arbitrary or capricious manner or was consummated without substantial evidence to support such action. *Beckham v. United States*, 375 F. 2d 782, 785, 179 Ct. Cl. 539, 543-544 (1967), cert. denied, 389 U.S. 1011, 88 S. Ct. 583, 19 L. Ed. 2d 613. Moreover, in considering the issues of arbitrariness and lack of substantial evidence, we are entitled to review all available evidence, including de novo evidence taken before one of our commissioners, as well as the administrative record. *Brown v. United States*, 396 F.2d 989, 184 Ct. Cl. 501 (1968); *Beckham v. United States, supra.*"[1]

That judicial standard of review by the United States Court of Claims requires examination of the merits of the agency action to ascertain whether that action was arbitary or capricious and/or unsupported by substantial evidence. An assessment by the Court of Claims of evidence supporting the agency decision is but one aspect of that Court's review of the agency's action. The United States Court of Appeals of the District of Columbia, on the one hand applied only a limited review of the evidence supporting the agency's dismissal of Petitioner here. A conclusion

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[1] Accord See: *Wathen v. United States*, 208 Ct. Cl. 342, 527 F.2d 1191 (1975); *Razik v. United States*, 208 Ct. Cl. 265, 525 F.2d 1028 (1975); *Poschl v. United States*, 206 Ct. Cl. 672 (1975); *Ricci v. United States*, 205 Ct. Cl. 687 (1974); *Roski v. United States*, 204 Ct. Cl. 40 (1974); *Jacobowitz v. United States*, 191 Ct. Cl. 444, 424 F.2d 555 (1970); *Kandall v. United States*, 186 Ct. Cl. 900 (1969); *Louks v. United States*, 184 Ct. Cl. 361, 395 F.2d 993 (1968); *Urbina v. United States*, 180 Ct. Cl. 194 (1967); *Greenway v. United States*, 175 Ct. Cl. 350 (1966).

that the dismissal was supported by substantial evidence was all that took place. Because the United States Court of Appeals for the District of Columbia and the United States Court of Claims review the vast majority of judicial appeals of federal employee dismissals, the *different* standards of judicial review applied by these two courts raise an important Federal question. A writ of Certiorari should be granted this Petitioner where, as here, an important question in construction of federal statute is present and one of which two U.S. Courts differ, *United States v. Muniz*, 374 U.S. 150, 10 L Ed. 2d 805, 83 S. Ct. 1850 (1963).

Since Petitioner raised as an issue before United States Court of Appeals for the District of Columbia, the contention that his removal was "an unjustified and unwarranted personnel action," Appendix A, page 6a, Petitioner is entitled under the appropriate and fair standard of review (as applied in the United States Court of Claims) to have this action against him reviewed to determine if his removal was effected in an arbitrary or capricious fashion as alleged by Petitioner. Neither the United States District Court nor the United States Court of Appeals has ever made such determination. This case should be remanded to the United States Court below with instructions for such a determination.

B. The Penalty of Dismissal Was More Severe Than the Facts Warranted

In the instant matter, the United States District Court for the District of Columbia found:

> "The determination whether discharge is necessary to promote the efficiency of the service is the kind of determination directed to the agency's expertise and discretion. There appears to be no

basis here for this court to substitute its judgment for that of the agency." Appendix B, page 12a.

The United States Court of Appeals affirmed this lower Court statement when it said:

"discretion lies primarily in the hands of the administrative agencies involved, and the courts will not substitute their own judgment for that of the agencies." Appendix A, page 6a.

The United States District Court and the United States Court of Appeals in the instant matter refused to review the penalty invoked by the agency. The Court of Appeals commented in *Mendelson v. Macy*, 123 U.S. App. D.C. 43, 356 F.2d 796 (1966), on this point:

"We do not sit to revise the particular penalty imposed, provided it is within the applicable range of choice." 356 F. 2d at 799, note 4.

This is certainly not the same standard of penalty review applied by the United States Court of Claims, where an unusually harsh penalty meted out in light of all the facts may be held to be an abuse of discretion by the agency. In *Boyce v. United States*, 211 Ct. Cl. 57, 61, 543 F.2d 1290, 1292 (1976) that court stated:

"In an overall sense, it is well established that the penalty for employee misconduct is a matter usually left to the sound discretion of the executive agency. See, e.g. *Hoover v. United States*, 206 Ct. Cl. 640, 513 F. 2d 603 (1975); *Birnholz v. United States*, 199 Ct. Cl. 532 (1972); *Cook v. United States*, 164 Ct. Cl. 438 (1964). However,

if the punishment exceeds the range of sanctions permitted by statute or regulation, *Daub v. United States*, 154 Ct. Cl. 434, 292 F. 2d 895 (1961); *Cuiffo v. United States*, 131 Ct. Cl. 60, 68, 137 F. Supp. 944, 949 (1955), or if the penalty is so harsh that it amounts to an abuse of discretion *Heffron v. United States*, 186 Ct. Cl. 474, 484, 405 F.2d 1307, 1312 (1969); *Jacobowitz v. United States*, 191 Ct. Cl. 444, 458-59, 424 F.2d 555, 563 (1970), it cannot be permitted to stand.

In the case at bar, plaintiffs do not allege that dismissal fell outside the range of penalties prescribed for failure to file tax returns in a timely manner. However, they contend that in light of all the facts, the penalty of dismissal was 'unconscionably disproportionate.' We agree."

The usual test for abuse of discretion in evaluating a penalty necessitates a showing by plaintiff that the penalty is so harsh that there is an "inherent disproportion between the offense and punishment." Further, if an abuse of discretion is demonstrated, the Court will set aside the penalty even where it lies within the range of penalties permitted by statute or regulation. *Grover v. United States*, 200 Ct. Cl. 337 (1973). It was found to be an abuse of discretion for the Agency to impose the maximum penalty permitted when the employee only committed a de minimis offense. *Power v. United States*, 209 Ct. Cl. 126, 131, 531 F. 2d 505 (1976).

As this Court noted in *United States v. Testan*, 424 U.S. 392, 47 L.Ed.2d 114, 96 S. Ct. 948 (1976) until the passage of the Lloyd-Lafollete Act, 5 U.S.C. 7501, et seq. (1970), federal personnel actions were entirely discretionary and not subject to any judicial review of a claim of wrong-

ful adverse action. The scope of judicial review of agency decisions extends to an examination as to whether the agency actions are found to be an abuse of discretion.

In his appeal to the United States Court of Appeals for the District of Columbia, Petitioner protested his dismissal as "an unjustified and unwarranted personnel action," Appendix A, page 6a. Petitioner protested that the allegations supporting his dismissal found by the Board of Appeals and Review of the Civil Service Commission were in error or were de minimis. Those protestations, outlined below, were not considered by the reviewing courts in relation to the penalty imposed. Such review of the penalty would have followed in the United States Court of Claims under the rationale of *Boyce v. United States, supra* and *Power v. United States, supra.*

The Civil Service Commission Board of Appeals and Review sustained six of the seventeen specifications against Petitioner and in so doing sustained three of the four charges brought against Petitioner. The particular specifications sustained by the Board in approving the dismissal of Petitioner were either "de minimus" offenses or were sustained with an insufficient understanding of the accounting principles involved in the allegations of unsatisfactory performance. The decision of the Board in sustaining the particular specifications were based almost entirely upon an account of Petitioner's supervisor. While Petitioner is a CPA licensed in Texas, his supervisor had only a limited background in accounting. Following are the specifications sustained by the Board as evidence of unsatisfactory performance:

1. Specification 1(b)(1), Assignment 2105.2003, Incentive Price Redetermination

This specification was not sustained by the Civil Service Regional Appeals Examiner who found that since the agency cited the wrong contract number in the specification, Petitioner was not afforded a reasonable opportunity to answer, Appendix D, page 50a. The Board of Appeals and Review sustained the specification based on the Petitioner's reply, Appendix C, page 19a. In actuality, this claim of unsatisfactory performance involved an allegation that Petitioner wasted $47.18 of an auditor's time by requesting an audit of a particular contract before all audit information was available. That the alleged claim is de minimus is obvious when the amount claimed as wasted of $47.18 is compared to the approximately $8,500,000 of federal funds Petitioner questioned during his tenure in the Garland office, as charges which were erroneously made by defense contractors.

2. Specification 1(b)(2)(a) Overhead; Bases for Allocation

This specification was sustained by the Regional Appeals Examiner (Appendix D, page 50a) whose finding was affirmed by the Board of Appeals and Review (Appendix C, page 19a). This claim of unsatisfactory performance related to the supervision Petitioner exercised over his most experienced subordinate auditor. No claim was made that this specification resulted in adverse consequences. The claim simply related to late verification of certain bases used to distribute overhead costs. The verification of those bases, however, was completed *before* the audit was finished. The error charged against Petitioner was that he relied on his most experienced auditor to verify certain accounting bases. At this time Petitioner was also involved in clearing a five year backlog of work.

3. Specification 1(b) (2) (e) Overhead; Insurance

This specification was sustained by the Regional Appeals Examiner (Appendix D, page 52a) whose finding was affirmed by the Board (Appendix C, page 25a). This claim of unsatisfactory performance involved the improper assignment of a $4,500 insurance policy to an overhead pool of approximately $1,000,000, an error of less than one-tenth of a percent, certainly "de minimus." The specification was sustained by both the Region and the Board based on Petitioner's assertion that he "overlooked the item." Petitioner "overlooked the item" because that particular item was one of many assignments within seven folders containing numerous working papers each of which contained numerous items similar to the item cited in the specification. While the Petitioner did not correct this one particular item in the multitude of data he reviewed, Petitioner did bring the item to light and questioned his supervisor as to the correct assignment of the item. Upon the return of his report from his supervisor, Petitioner corrected the error. There was no claim of adverse consequences made by the Agency, nor could any be made. This particular item applied to a prior year and had no effect on the assignment involved in the specification.

4. Specification 1(b) (4) Completion of Indicated Assignments

This specification was sustained by the Regional Appeals Examiner (Appendix D, page 55a) whose findings was affirmed by the Board (Appendix C, page 26a). This specification involves the claim that Petitioner did not keep his supervisor apprised of the status of various projects. No claim of adverse consequences whatsoever was made by the Agency. Although the specification was sustained, this particular specification of unsatisfactory performance related not to the technical performance of Petitioner's duties, but his omission in not apprising his supervisor of the status of certain audits or report the results of particular audits. At the time involved herein, Petitioner was attempting to clear a huge five year backlog of assignments. According to the standard office procedure, Petitioner had noted the status of each project in the working log maintained for each project, a copy of which his supervisor maintained in his file. Although Petitioner had discussed these assignments with his supervisor orally, Petitioner had not received guidance from his supervisor as to further action required on these assignments.

5. Specification 2(b) (1) Post Award Review

This specification was sustained by the Regional Appeals Examiner (Appendix D, page 56a) whose finding was affirmed by the Board (Appendix C, page 26a). This specification involves the allegation that Petitioner did not issue a corrected and updated report pursuant to his supervisor's instructions. No claim of adverse consequences was made by the agency. Petitioner did not issue a corrected report because he did not consider the initial report in error. Although Petitioner discussed this matter with his supervisor, he never received any guidance on report corrections. Petitioner considered that in his experience, further steps here were a waste of time and money and non-productive.

Standard office procedures applied to the investigation practice related to the amount of defective overcharges. If a certain minimum percentage of at least 5% was not found, further investigation was unnecessary. As that minimum percentage was not met in this instance, Petitioner had complied with office procedures by not extending the investigation. Petitioner considered his work herein correct and complete.

6. Specification 3(b) (2) Forward Pricing Rates with Continental

This specification was not sustained by the Regional Appeals Examiner (Appendix D, page 60a), however, the Board disagreed and sustained the specification (Appendix C, page 29a). This specification involved the claim that Petitioner, as auditor-in-charge, should have been able to explain the Agency's position with regard to a certain accounting procedure. No claim of adverse consequences was ever raised by the agency.

Although Petitioner was completely knowledgeable of the matter involved in that discussion, Petitioner permitted his subordinate to lead the discussion because Petitioner's subordinate had been transferred to this contractor's plant six months previously as auditor in residence, although still under Petitioner's supervision. As auditor in residence, the subordinate was in daily contact with the contractor's personnel. Petitioner was in daily contact with the subordinate and had discussed with him each item on the contractor's proposal.

This particular small contractor proposed to omit certain material from the base for allocating general and administrative costs. Petitioner opposed this proposal as a practice not within generally accepted accounting procedures. Earlier, the Petitioner's supervisor had permitted a major contractor to omit some three million dollars of the same material from the base for allocating general and administrative costs.

This earlier action by the Petitioner's supervisor resulted in the American taxpayer picking up approximately six percent of the general and administrative expense that should properly have been borne by commercial contracts. Petitioner had earlier strongly objected to this practice by a major contractor and again objected to this proposed practice by a smaller contractor. Both the major contractor and the smaller contractor were or had been subsidiaries of the same parent company. As Petitioner's supervisor had permitted the major contractor to omit certain material from the base for allocating general and administrative costs, but refused to allow the smaller contractor to engage in the same practice, Petitioner was at a loss to explain why the two contractors were being treated differently.

While the Board of Appeals and Review affirmed the findings of the Regional Hearing Examiner on four of the six specifications, the Board reversed the Regional Examiner and sustained two specifications: 1(b)(1) and 3(b) (2). Had the Board and the Region sustained the same specifications, Petitioner would have been reinstated. Apparently the Board placed undue emphasis on specifications 1(b)(1) and 3(b)(2) as important, either in themselves or as cumulative to the other four specifications sustained. Closer examination of these specifications disclosed, however, the specifications sustained involve only claims that are extremely small ("de minimus"), as in 1(b)1, or involve complicated accounting procedures to which the Board of Appeals and Review did not address itself – see specification 3(b) (2).

Careful review of these specifications demonstrates that the penalty of dismissal is far too extreme here – especially when examined in the light of Petitioner's excellent record of service.

While the reviewing courts will respect the agency's discretion in determining an appropriate remedy, the reviewing court should always examine the findings of the Board of Appeals and Review in relation to the extreme penalty

imposed. This is the standard of review applied to the United States Court of Claims. Petitioner's appeal should be remanded for such a determination.

C. The Board of Appeals and Review Relied Upon Ex-Parte Communications from Respondent in Rendering Its Decision

In its decision the Court of Appeals for the District of Columbia found that evidence was presented to the Board of Appeals and Review which was not available to the Regional Appeals Examiner, and therefore, was not part of the administrative record forwarded by the Regional Appeals Examiner. Although the communication was strictly ex-parte and presented a case where the Petitioner had no opportunity to respond, the Court of Appeals nevertheless said:

> "Appellant has identified but one piece of 'evidence' of which he was not timely apprised, and having scrutinized the Commission's decision we are assured that this omission was harmless, for the document in issue played no apparent role in the Board's determination with respect to the six specifications it sustained" Appendix A, page 5a.

The Civil Service procedure of review of dismissal is two-tiered. In this instance, no hearing was held. The first tier of review of evidence was that submitted by a Regional Appeals Examiner, who found in favor of the Petitioner. An appeal of the Examiner's decision was taken by the Respondent agency. During this appeal process, the Board of Appeals and Review allowed Respondent to submit evidence that was outside of the administrative record.

It could have and should have been presented for initial review by the Regional Appeals Examiner if Respondent chose to rely upon it.

Section 7(d) of the Administrative Procedures Act provides that the transcript of testimony and exhibits together with all papers and requests filed in the proceeding shall constitute the exclusive record for decision. The record is made up of the transcript and all papers and requests filed in the proceeding including the pleadings, the initial recommended or tentative decision or report and the final decision or report. *Davis, Administrative Law Treaties,* Section 8.14. In the Civil Service framework of review of employee dismissals, the Board of Appeals and Review should apply the same rationale as a reviewing court which passes on the recommendation of the hearing examiner. Neither the hearing examiner nor the Board should ever receive ex-parte communications.

The Court of Claims addressed this very question of ex-parte communication in *Camero v. United States,* 179 Ct. Cl. 520, 375 F.2d 777, 780-781 (1967) stating:

> "Of course, one of the fundamental premises inherent in the concept of an adversary hearing, particularly if it is of the evidentiary type, is that neither adversary be permitted to engage in an ex-parte communication concerning the merit of the case with those responsible for the decision. * * * It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such activity would be to render the hearing virtually meaningless."

The *Camero* principle was applied in *Ryder v. United States*, ___ Ct. Cl. ___ (October 1978).

> "Where a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay, the court has regularly taken the position that the defect divests the removal (or demotion) of legality, leaving the employee on the rolls of the employing agency and entitled to his pay until proper procedural steps are taken toward removing or disciplining him. In that situation, the merits of the adverse action are wholly disregarded." ___ Ct. Cl. at ___.

To the same effect see *Jarrett v. United States*, 195 Ct. Cl. 320, 451 F.2d 623 (1971) and cases cited therein. By admitting the ex-parte communication, the Board went beyond that evidence evaluated by the Regional Appeals Examiner. While the Court of Appeals dismissed this exparte communication as harmless, Petitioner is entitled under appropriate due process considerations to know and respond to all the charges and material against him, *Green v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959).

Petitioner requests that this Court remand the case to the U.S. District Court for a determination of whether this procedural defect was serious enough to warrant reinstatement of Petitioner, regardless of the merits. As the Court of Appeals pointed out in its decision, the Board of Appeals and Review affirmed four of the six specifications sustained, *principally* on the basis of the Regional Appeals Examiner's findings and analysis, Appendix A, page 6a. If the two additional specifications sustained only by the Board of Appeals and Review were based on ex-parte communications, which in turn led to a reversal of the decision of the Region to reinstate the Petitioner, then Petitioner has obviously been

prejudiced. This determination has not yet been made by the Court below.

CONCLUSION

This Court should accept this Petition for a Writ of Certiorari in order to right the wrongs which have been inflicted upon the Petitioner, and to resolve the conflict between the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Claims as to the standard of judicial review of Civil Service actions. This case further presents the important questions of the relationship of the penalty imposed by the Federal agency to the charges alleged and the use of ex-parte communications in an administrative review of Civil Service actions.

Respectfully submitted,

By _____

John I. Heise, Jr.
861 Pershing Drive
Silver Spring, Maryland 20910
585-8400
Attorney for Petitioner
HEISE JORGENSEN STEFANELLI
& BOSWELL P.A.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1531

September Term, 1978

John Q. Thompson, Civil Action No. 76-1793

Appellant

v.

UNITED STATES OF AMERICA,
et al.

Appeal From the United States District Court
for the District of Columbia

Before TAMM and ROBINSON, *Circuit Judges,* and LOUIS F. OBERDORFER, *United States District Judge for the District of Columbia**

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed herein by the parties.

On consideration of the foregoing, it is ordered and adjudged by this Court that, for the reasons expressed in the accompanying memorandum, the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

/s/George A. Fisher
George A. Fisher
Clerk

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*Sitting by designation pursuant to 28 U.S.C. §292(a) (1970).

MEMORANDUM

Rejecting appellant's challenges to the decision by the Board of Appeals and Review of the Civil Service Commission sustaining his discharge from the Defense Contract Audit Agency, the District Court entered summary judgment against him. As we deem that disposition unimpeachable, we affirm.

Appellant advances several procedural objections to the Board's determination, none of which we regard as sound. First he contends that the Board impermissibly entertained the Agency's assertedly untimely appeal from the decision rendered by the Dallas Regional Office initially disapproving the discharge. Pertinent Commission regulations, however, provide for an appeal "within 15 calendar days after *receipt* of the decision on the initial appeal."[1] Though the regional hearing examiner's determination was issued April 24, 1973, the Agency's notice of appeal, dated May 4, indicated that the initial decision was not received until April 30.[2] The Agency forwarded its appellate brief on May 11 and it reached the Board on May 14, within 15 days of April 30. Nothing of record impugns the Agency's representation with respect to the date of its receipt of the examiner's decision.[3] That being so, the District Court's conclusion that the appeal was seasonably pressed must be upheld.

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[1] 5 C.F.R. §772.307(a) (1973) (emphasis supplied).

[2] See also Letter from Paul Evans, Regional Manager, Defense Contract Audit Agency, to William P. Berzak, Chairman, Board of Appeals and Review (July 5, 1973), Record Attachments 20.

[3] Although the initial decision is dated April 24, 1973, appellant has produced nothing to indicate that the decision was mailed on that date. And even if it was mailed on the 24th, no showing was made that it should have been, and was, delivered to the Agency prior to the date it avers.

Appellant further contends that the Board "legally misapplied" the standard governing specificity of charges by the employing agency.[4] Whether viewed as an assault on the legality of the standard embraced by the Board or on the application thereof, appellant's position lacks merit. To be sure, he advances as the correct specificity test that set forth in Commission regulations:

> When the reasons allege unsatisfactory work performance rather than improper conduct, the specificity and detail will be different but the test for adequate specificity and detail will be the *same*: Did the employee have a fair opportunity to refute the reasons given for the proposed action?[5]

The Board is said to have erred in opining that "in cases relating to unsatisfactory work performance the requirements for specificity and detail are less stringent than in other cases."[6] Examination of the Board's discussion of specificity, however, reveals a clear comprehension of the standard controlling; indeed, the Commission's regulations are quoted in pertinent part in the text of the Board's opinion.[7] We believe, too, that the Board's adherence to the principle announced in *Schlegel* – that when an employee replies exhaustively to the notice, it is evidence that he has understood the bases for the proposed action and has had a fair oppor-

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[4] Brief for Appellant at 8.

[5] FPM Supplement 752-1, subchapter S 4(a), quoted in Brief for Appellant at 8.

[6] Joint Appendix (J. App.) 86, quoted in Brief for Appellant at 8.

[7] J. App. 86

tunity to defend himself[8] – was faithful to the strictures of the standard embodied in the Commission's regulation. The Board scrupulously reviewed the Agency's charges, and appellant's responses thereto, to ascertain whether appellant was sufficiently apprised of the Agency's reasons for severing him, and we think the Board's conclusions in that regard were palpably reasonable. Accordingly, we have no occasion to upset the administrative judgment on that score.

Nor can appellant prevail because of the Board's failure to deal explicitly with each legal argument marshalled by him in his brief in the proceedings before it. The Board declared that "[a]ll representations submitted by the Agency and by and on behalf of [appellant] have been fully considered by the Board of Appeals and Review in its adjudication of this appeal."[9] And we have no reason to assume that due deliberation was not afforded appellant's contentions. Having reviewed the record and the Board's decision, we are satisfied that the Board has not slighted material concerns, and the bases for its conclusions are fully articulated.[10] The District Court, then, correctly

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[8] *Schlegal v. United States*, 416 F.2d 1372, 1376 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970); See J. App. 86.

[9] J. App. 85

[10] Although all substantive issues were addressed fully, it is true that the Board did not discuss the question of timeliness of the appeal. In the circumstances of this case, we do not regard that a critical omission. Appellant's arguments to the Board on the timeliness issue assumed that the appeal was filed late and urged a hearing to inquire into justification. But as we have indicated, see note 3 *supra* and accompanying text, the Board was offered nothing tending to show actual receipt of the initial decision by the Agency before April 30. The Board's failure to discuss a plainly insubstantial question of timeliness is scarcely condemnable.

declined to find procedural fault with the Board's treatment of appellant's legal argumentation.

Appellant's final procedural challenge similarly does not warrant reversal. On this appeal he asserts for the first time that summary judgment was inappropriate because the Agency submitted for Board consideration evidence not presented at the initial hearing, and because he lacked the opportunity to rebut one item of such evidence.[11] Apellant's failure to advance this point before the District Court might alone warrant its rejection here,[12] and in any event it lacks force on the merits. The Board's receipt of evidence not available to the hearing examiner is not procedurally unfair provided interested parties are afforded an opportunity to respond to it. Appellant has identified but one piece of "evidence"[13] of which he was not timely ap-

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[11] The Board acknowledged its practice of "consider[ing] whatever written evidence is presented up to the time of adjudication, after affording the other party an opportunity to comment or rebut." J. App. 90.

[12] In *Polcover v. Secretary of Treasury*, 155 U.S. App.D.C. 338, *477 F.2d 1223, cert. denied*, 414 U.S. 1001 (1973), we indicated that our reviewing function vis-a-vis administrative determinations is essentially identical to that of the District Court. See *id.* at 341-342, 477 F.2d at 1226-1227. But that does not justify bypassing remedies in the District Court, perhaps needlessly prolonging litigation and taxing judicial resources. *Cf. id.* at 351-352, 477 F.2d at 1236-1237.

[13] The so-called evidence was actually a reply by the resident auditor, who initiated the charges, to appellant's response to those charges. The document might properly be characterized, therefore, as a reply brief for the Agency, which then was in the posture of an appellant. We assume arguendo, however, that the reply constituted evidence, subject to rebuttal pursuant to Commission practice. See note 11 *supra*.

prised, and having scrutinized the Commission's decision we are assured that this ommission was harmless, for the document in issue played no apparent role in the Board's determination with respect to the six specifications it sustained.[14]

Lastly, appellant mounts an attack on the substantive reasonableness of the Board's decision. He is met at the outset with argument that this issue is not properly before us because appellant raised only procedural objections in the District Court. A strict reading of appellant's complaint buttresses that view somewhat, but appellant did seek a judicial declaration that his removal was "an unjustified and unwarranted personnel action."[15] Beyond that, the District Court undertook to review the Board's decision on the merits.[16] We thus deem the issue appropriately presented on this appeal.

The scope of judicial review on the merits of a Civil Service discharge is narrow. As this court has explained, "[d]iscretion primarily lies in the hands of the administrative agencies involved, and the courts will not substitute their own judgment for that of the agency's.[17] We may determine only "whether the decision to remove the em-

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[14] Indeed, four of the six determinative specifications were sustained principally on the basis of the regional examiner's findings and analysis.

[15] J. App. 101.

[16] *Thompson v. Rumsfeld*, No. 76-1793 (D.D.C. Apr. 5, 1977), at 2-3. See also Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss ¶ 10.

[17] *Gueory v. Hampton*, 167 U.S. App. D.C. 1, 4, 510 F.2d 1222, 1225 (1974).

ployee was aribtrary and capricious,"[18] for we do "not sit as ombudsmen for government employment relations."[19] These precepts compel affirmance in the instant case.[20]

The Board's conclusion with respect to specifications 1(b)(1) and 1(b)(2)(a) were based upon appellant's own concessions. Indeed, appellant does not vigorously deny that the alleged transgressions occurred, but seeks merely to minimize their importance.[21] In specification 1(b)(2)(e), appellant was charged with failure to remain informed about an insurance schedule prepared by a subordinate, and particularly with failure to review an insurance policy that possibly extended unallowable coverage. In response to that allegation, appellant acknowledged that he "overlooked the item."[22] By way of supplemental rebuttal, appellant further represented that a notation on the audit schedule reported, that the insurance policy "[s]hould [have been classified with] 1968 costs."[23] Appellant maintained that

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[18] *Id.*; see *Meehan v. Macy*, 129 U.S. App. D.C. 217, 225, 392 F.2d 822, 830 (1968), *on rehearing*, 138 U.S. App. D.C. 41, 425 F.2d 472 (1969).

[19] *Doe v. Hampton*, 184 U.S. App. D.C. 373, 379, *566 F.2d 265*, 271 (1977).

[20] Whatever the arbitrary-or-capricious standard might imply about requisite evidentiary support, see *Doe v. Hampton, supra* note 19, 184 U.S. App. D.C. at 379-380 n.15, 477 F.2d at 271-72 n. 15, the action challenged herein is supported by substantial evidence.

[21] Appellant has suggested that the Board arrived at no determination on the merits in regard to specification 1(b) (1). We do not agree. The Board expressly stated that appellant "concede[d] that the assignment should not have been written." J. App. 88.

[22] J. App. 16.

[23] Record Attachments 324.

the item consequently "did not even belong in the 1969 Overhead."[24] He has urged here, but not before the District Court, that he "overlooked" the matter because it was extraneous to the 1969 Overhead. Appellant's contention, though troubling, is ultimately not persuasive. The specification alleged failure of control, and appellant at first appeared to acknowledge a default in that regard. His supplementary explanation does not necessarily dispel the impression created by his initial responses that he simply failed to review and verify the schedule entries. We cannot say that the Commission could not attach controlling significance to appellant's apparent concession notwithstanding his later rebuttal. And we are particularly reluctant to upset the District Court's affirmance on the basis of an argument not developed before it.[25]

The Board's findings with respect to specification 1(b)(4) are supported by assignment and work records, and declarations by Mr. Van Der Veen. Evidence adduced by appellant detracts from the Board's determination, but not so much so as to deprive it of substantial support. Similarly, we cannot say that evidence relied on by the Region and the Board relative to specification 2(b)(1) was appreciably undermined by appellant's protestations that his obligations were dispelled by oral communications between Mr. Van Der Veen and himself. Moreover, the Region's discussion, endorsed by the Board on review, evinces careful consideration of appellant's evidentiary showing. Finally, the Board's appraisal of specification 3(b)(2), predicated importantly upon the revision of appellant's explanatory letter by the resident auditor, has substantial support in the record, not-

[24] *id.*

[25] See note 12 *supra.*

withstanding appellant's thesis on the legitimacy of certain accounting practices. Appellant's general averments concerning office backlog, working conditions, absences of the resident auditor and the resident auditor's qualifications, to the extent relevant, enhance appellant's position but fall somewhat short of neutralizing the evidentiary foundation for the Board's conclusions.

Whether this court or the District Court might be inclined in a de novo proceeding to afford appellant relief is quite beside the point. He has not demonstrated that the Board's determinations are procedurally infirm or substantively arbitrary or capricious. Accordingly, there is no basis for upsetting the District Court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN Q. THOMPSON,

Plaintiff

v. CIVIL ACTION NO. 76-1793

DONALD RUMSFELD, ET AL.,

Defendants

MEMORANDUM AND ORDER

In this action, Plaintiff, a former employee of the Defense Contract Audit Agency ("DCAA"), a branch of the Department of Defense, sues for reinstatement and back pay, alleging wrongful discharge from the service. The matter is presently before the Court on Defendants' motion to dismiss or in the alternative for summary judgment. For the reasons discussed below, the Court concludes that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law.[1]

This Court is engaged in limited judicial review in federal employee adverse action litigation. The Court's determination is based upon consideration of the administrative record; no de novo evidentiary hearing is permitted. *Polcover v. Secretary of Treasury*, 477 F.2d 1223, 1225-1226 (DC Cir 1973). The issue before the Court is whether the agency denied the employee his appropriate procedural

[1] The Court, therefore, does not rule on Defendants' arguments concerning the applicability of the doctrine of laches to this litigation.

rights and whether the decision to remove the employee was arbitrary and capricious. *Gueory v. Hampton*, 510 F.2d 1222, 1225 (DC Cir 1974).

Plaintiff was informed by letter dated October 6, 1972, that he would be terminated for unsatisfactory performance. Despite Plaintiff's lengthy written reply to the charges against him, Plaintiff was ultimately discharged on November 17, 1972. Plaintiff appealed to the regional branch of the United States Civil Service Commission, which held DCAA's proceedings inadequate and recommended reinstatement. DCAA appealed this result to the Civil Service Commission Board of Appeals and Review ("BAR"), and on September 24, 1973, BAR reversed the decision of the regional office and upheld Plaintiff's termination.

The record in this case supports the actions of the agencies involved. Regarding Plaintiff's procedural rights, BAR found that Plaintiff was adequately informed of the charges against him and of the basis for his termination.[2] Regarding the merits of the matter, BAR found that enough instances of unsatisfactory performance were proven by DCAA to sustain the charge that Plaintiff failed to perform his duties in accordance with agency requirements.[3] BAR thus concluded that Plaintiff's separation was warranted and effected for such cause as to promote the efficiency of the service. BAR's decision contains adequate reasoning and

[2] BAR reached this conclusion relying upon the nine page dismissal notice of October 6, 1972, which detailed the substance of the classes of charges against Plaintiff; upon Plaintiff's twenty-nine page response, in which he dealt with the various allegations of unsatisfactory performance; and upon the decision of the Court of Claims in Schlegel v. United States, 416 F.2d 1372 (Ct.Cl. 1969).

[3] BAR was influenced heavily by Plaintiff's own admissions concerning his performance on the various projects under examination.

justification to support the findings reached. The determination whether discharge is necessary to promote the efficiency of the service is the kind of determination directed to the agency's expertise and discretion. There appears no basis here for this Court to substitute its judgment for that of the agency. *Gueory, supra,* at 1225. This Court cannot say that Plaintiff has been denied any procedural rights or that the actions of DCAA and BAR have been arbitrary and capricious.[4]

Accordingly, it is this 5th day of April, 1977,

ORDERED, that Defendants' Motion for Summary Judgment be and it is hereby GRANTED, and this case is hereby DISMISSED.

/s/Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

[4] The Court is also satisfied that DCAA's appeal to BAR was timely filed.

APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

DECISION

IN THE MATTER OF

TYPE CASE: *Removal: Inefficiency*

John Q. Thompson

INTRODUCTION

The Defense Contract Audit Agency (DCAA), Atlanta Region, Georgia, filed an appeal from the decision of the Commission's Dallas Region dated April 24, 1973, reversing the Agency's action whereby the appellee was removed, effective November 17, 1972. At the time of his removal, the appellee was employed in the position of Auditor, GS-12, at Garland, Texas.

STATEMENT OF THE CASE

By notice dated October 6, 1972, the Resident Auditor of the Agency's Garland Division advised the appellee of the Agency's proposal to remove him from his position as Auditor-in-Charge of the E-Systems Suboffice, for failure to perform his duties in accordance with requirements furnished by letter dated February 29, 1972, subject "Performance Goals." The specifics of the charge are set forth

in paragraphs 1 through 8 of the advance notice and are quoted in full in the Dallas Region's decision.

The appellee submitted a twenty-nine page reply dated October 14, 1972. The record contains a memorandum, undated, from the Resident Auditor (appellee's supervisor) specifically pertaining to the appellee's reply.

In his decision dated November 3, 1972, the Resident Auditor notified the appellee that the charge of failure to perform his duties in accordance with requirements was fully supported by the evidence of record and warranted his removal to promote the efficiency of the service. An effective date of November 10, 1972, specified in the notice of decision was changed on that date to November 17, 1972.

The appellee elected not to process his appeal under the agency's appellate system but instead, appealed his case directly to the Dallas Regional Office (hereinafter the Region).

REGION'S DECISION

In its decision, issued on April 24, 1973, the Region found with respect to the procedural aspects of the case that the following parts of the four enumerated specifications failed in their entirety: 1b(2) (d); 1b(2) (f); 1b(3); 2b(2); 4b(1) (a), in addition to the two paragraphs of the notice document, quoted on pages 10 and 11 of the Region's decision. Specification 3b(2) was also found to be, "in part," lacking in specificity and detail, and did not constitute a cause of action. Except for the aforementioned parts of the specifications, the decision concluded that the agency complied with the procedural requirements of Part 752-B of the Civil Service Regulations. With respect to the merits,

the Region sustained Specification 2, which related to the timeliness, objectivity, accuracy, and the meeting of reporting standards. However, Specifications 1, 3, and 4 were not sustained by the preponderance of evidence. The Agency's action of removal was disapproved, and the decision by the Region recommended that the appellant be retroactively restored to the position from which he was removed.

REPRESENTATIONS TO THE BOARD OF APPEALS AND REVIEW

The Agency appealed by letter dated May 4, 1973, and submitted representations by letter dated May 11, 1973. The appellee made rebuttal through his counsel, dated June 25, 1973. All representations submitted by the Agency and by and on behalf of the appellee have been fully considered by the Board of Appeals and Review in its adjudication of this appeal.

ANALYSIS AND FINDINGS

The Agency contends that the Region erred in "eliminating certain specifications for lack of specificity and also erred in finding other specifications unsupported by documenting evidence. The Agency also alleged that the appellee was able to fully respond to the charges made in the notice of proposed removal; that the appellee's response reflected his specific knowledge of such deficiencies; and that he had access to the necessary details such as work papers, letters, and assignment folders. The Agency further alleges that certain specifications were taken out of the context of the charge itself, which contained the specifics that the specification was alleged to lack. The Agency cited Specification 1b(2) *Assignment 2104.2001 1969 Overhead* as an il-

lustration, that the Region used information in subparagraphs 1b(2) (d) and 1b(2) (f) to strip the detail of the charge as contained in paragraph 1b (2).

It is well established that in cases relating to unsatisfactory work performance the requirements for specificity and detail are less stringent than in other cases. A notice of proposed adverse action involving unsatisfactory work performance such as this case need not be prepared with the refinement attached to a charge of improper conduct wherein the specificity and detail requirement is not met unless the notice includes names, times, and places. FPM Supplement 752-1, Subchapter S4(2), states that "when the reasons allege unsatisfactory work performance rather than improper conduct, the specificity and detail will be different, but the test for adequate specificity and detail will be the same: Did the employee have a fair opportunity to refute the reasons given for the proposed action?" In this regard, the Board notes from the court's decision in *Schlegel v. U.S.* that "when an employee makes an exhaustive reply to the notice, this is evidence that he has understood the reasons for the proposed action and has had a fair opportunity to defend himself."

In the light of the above, the Board disagrees, with three exceptions, with the decision of the Dallas Regional Office that a number of the Agency's specifications were procedurally defective. The exceptions pertain to Specification 1b(3), 2b(2), and the two paragraphs of the advance notice referred to near the bottom of page 10 of the Region's decision. The Board is in agreement with the Region's findings of procedural defects with respect to those items. Otherwise, the Board finds for the reasons given below that the advance notice specifically describes the work that the appellee, as an Auditor-in-Charge, was

requested to perform in required fashion and did not, and concludes from a careful reading of the advance notice and the appellee's lengthy, detailed written answer that that he was afforded a fair opportunity to join issue with the stated reasons for the proposed removal action. Further, the record establishes that the employee admitted in his October 14, 1972, letter of reply that he had a degree and a Certified Public Accountant certificate. With this academic background in addition to his auditing experience gained since the date of his entry on duty, January 21, 1963, we believe that he was fully aware of the DCAA professional auditing standards, accounting and auditing terminology, and the DCAA's policies and reporting responsibilities. The Board therefore finds with respect to Specification 1b (2) (d) that the appellee was aware of the accruals assignment (exhibit 21), that such assignment was discussed with him (exhibit 19), and that any auditor in charge of such an assignment would have recognized "large amounts" of accruals as a routine audit function. The Board reverses the Region with respect to Specification 1b(2) (d) and the specification is found to be procedurally sufficient.

With respect to Specification 1b(2) (f) the Board notes that this was a subparagraph of 1b(2) which contained the name of the auditor in question and related a lack of review and instruction of his work which the appellee acknowledged in his reply. The omission of the specific month is, in the Board's judgment, not an important identification. The phrase "a large amount" was referred to as 10% of the expenses relating to Bidding and Proposal, which in the Board's judgment was obviously a large amount. In this regard, the Board notes that proper construction and interpretation of this subparagraph and other subparagraphs of these specifications require that they be considered as part of their main paragraph; in other words, this subpara-

graph 1b(2) (f) is not considered separately, outside the context of the topical paragraph 1b. The Board sustains this specification as procedurally adequate and reverses the related finding of the Dallas Regional Office.

The Board finds that Specification 2b(2) meets the specificity and detail requirement. The specification related that from a review of the work papers of the draft audit reports, there was a lack of documented evidence that the appellee (as the Auditor in Charge) provided any guidance to his subordinate auditors relative to the performance and completion of the audit reports. With reference to "agency standards", the Board notes that the agency's "Performance Goals" were incorporated within the first paragraph of the advance notice. As indicated, the Board disagrees with the finding of the Region and finds Specification 2b(2) to be procedurally sufficient.

The Board finds that Specification 4b(1) (a) is in accordance with the specificity and detail requirement. On page 15 of the employee's reply he conceded that he understood that the "quality level" of the reports have not been desirable. Again the Board notes that proper construction of this subparagraph requires that it be construed within the context of 4b(1), which cites this subparagraph (4b(1) (a)) as an example of reports, submitted for release, that "are not in accordance with sound accounting and auditing techniques and CAM and do not give full disclosure. Accordingly, the Board disagrees with the Dallas Regional Office that Specification 4b(1) (a) failed in the requirement for specificity and detail.

In summary, all except three of the aforementioned specifications, or parts thereof, which the Region held to be procedurally defective are considered by the Board as having met the specificity and detail requirement and are procedurally sufficient otherwise.

As to the merits, the Regional Office held that Specification 1b(1) failed because it mentioned the wrong contract number. The Region found that therefore the appellant was not afforded a reasonable opportunity to answer. This is a finding of procedural defect, rather than a finding on the merits. The Board notes from the evidence of record that a wrong contract number was quoted in the specification. However, the appellee's reply shows that he knew the correct contract number, therefore the test of a reasonable opportunity to reply was met. In addition, he concedes that the assignment should not have been written. The Board sustains this specification.

The Region also found Specification 1b(2)(a) sustained and the Board agrees with the Region's analysis and findings with respect to this specification.

Specification 1b(2) (b) reads as follows:

> (b) *Expenses other than Voucher Register Entries.* A substantial amount of expenses in the various accounts did not specifically come from the Voucher Register. The audit workpapers, however, indicated that only the amounts charged through the Voucher Register were reviewed. You expressed great surprise and stated that you had completely relied upon the accounts payable sampling as being the total account. When questioned whether you had noticed this during your review, which you had stated at the start of this meeting had been very thorough, you didn't have an answer.

The meeting referred to was one on August 28, 1972, with respect to Assignment 2104.2001 1969 Overhead. The record contains no copy of the work papers referred to and no documentation of the meeting referred to. In his reply to the notice of proposed removal the appellee stated –

> 2. *Assignment 2104.2001 1969 Overhead.* I reported for work at this office December 7, 1970. On December 28, 1970 O. Gene Reeves reported for work at this office. Now, Gene Reeves had worked on the Overhead Team at DCAA, LTV, Inc. from January, 1967 until October, 1969. Naturally, I gave him the 1969 Overhead assignment. He worked on this assignment until May, 1971 at which time it was turned over to James Bratcher who, by his own statement to me, continued to get assistance from Gene Reeves, who was an Overhead specialist at LTV, Inc. for 3 years, and had worked on 1969 Overhead for about 5 months. When Gene was not present, Jim never hesitated to ask me questions which I answered to the best of my ability (I had a few years experience myself).

In written comments on the appellee's reply, the Resident Auditor stated –

> 2. *2104.2001 – 1969 Overhead.* To justify his past performance, he is trying to transfer his responsibility to the auditors on his team, blaming them for his poor performance and lack of knowledge. His comments are very general and not responsive to my specific charges, nor do they indicate what he has done or plans to do to improve performance. Specific notes on his subparagraphs are as follows:
>
> > (b) *Expenses other than Voucher Register.* Again he is very general in his response. He does not explain what he covered, he conveniently fails to disclose that he has yet to show me what he covered. (See also his comment to my letter, page 4, 2104.2005)

Page 4 of the letter of proposed adverse action includes a reference to assignment 2104.2005, 1969 Journal Entries, for which 32 hours were budgeted and 61 hours were expended during March and April 1972.

In his representations in the appeal to the Dallas Region with respect to "Expenses other than Voucher Register Entries," the appellee expanded as follows on his statement in his reply concerning those entries:

> [The Resident Auditor] accuses me of only auditing voucher register entries. This is untrue. Assignment No. 2104.2005 Review of 1969 Journal Entries was assigned in March, 1972. The review was completed in April, 1972. Journal Entries also include accruals. [The Resident Auditor] has never understood accrual accounting.

The Region found the specification not sustained, noting that the burden of proof was on the Agency and that there was no supporting documentation in the record.

With its representations to the Board the Agency submitted additional documentary evidence (7 attachments) and contended with respect to this specifcation –

> *Reference Specification 1b(2)(b).* The examiner failed to recognize in this specification that [the appellee] did not record expenses that came from sources other than those reflected in Attachment 1 and failed to inform [the Resident Auditor] or incorporate any finding from journal entries in Assignment 2104.2001 (Exhibit 19). This is further supported in paragraph (Charge 1b(3)) Assignment 2104.2001 (Exhibit 19). It is further supported

> in paragraph (Charge 1b(3)) Assignment 2104.2005 (Exhibit 21) which specifically states that this assignment had not been furnished to or discussed with [the Resident Auditor].

The appellee's counsel, in his representations to the Board, objects to the introduction by the Agency of new evidence for consideration in connection with the further appeal. However, it is the Board's practice to consider whatever written evidence is presented up to the time of adjudication, after affording the other party an opportunity to comment or rebut.

Attachment 1 referred to by the Agency consists of work papers supporting that portion of the specification which states that a substantial amount of expenses in the various accounts did not specifically come from the Voucher Register. However, the gist of the specification appears to be that the audit work papers indicated review of only the amounts charged through the Voucher Register. The Agency has not produced any evidence in support of the allegation that only the amounts from the Voucher Register were reviewed, and no support for the statement attributed to the appellee that he had completely relied upon the accounts payable sampling as being the total account. Neither Attachment 1 nor Exhibit 19 referred to by the Agency contains such evidence. The record contains no admission by the appellee that he made the statement attributed to him, and no admission that entries from sources other than the Voucher Register were not reviewed. It was therefore the Agency's burden to support Specification 1b(2) (b), and since it has not done so, the Board finds that it is not sustained:

Specification 1b(2) (c) reads as follows:

> (c) *Rental Accounts.* Since the Garland Facility owns most of its real estate, the overall rental

> charges included in the various overhead accounts appeared out of line. When questioned whether you had obtained a listing of the real estate or other items being rented and how it was allocated you stated that you did not know what the rent was for and probably would have to do some more work in this area.

In his reply the appellee stated that he personally reviewed this account. In his appeal to the Region he states that the accusation is untrue, that the "Real Property Rental Listing was made May 5, 1971 (Exhibit G)." The specification alleges that the appellee's response to questioning was that he did not know what the rent was for and probably would have to do some more work in this area. In view of the appellee's denial, the burden of proof that he so responded is on the Agency. The Region found no supporting documentation or corroborating testimony that he was unaware that the account had been reviewed and concluded that the specification was not sustained.

In its representations to the Board the Agency states that the rental accounts had been reviewed but that the appellee was unaware of it. The Agency submitted a copy of a list of things to do on the 1969 audit, among which was included an item, "Review rent - real property," with a notation which the Agency states was made by a subordinate auditor, "John T. is doing this." The Agency states that the list was prepared at an August 28, 1972, meeting attended by the appellee and that had he been aware that the review had been done, he would have cross-referenced the item to show this. In his comments the attorney for the appellee contends that it is a question of whether the appellee's memory served him correctly at the August 28 meeting.

The Board believes that if, as the appellee stated, he personally reviewed the account, he would have remembered it at the August 28 meeting. Nevertheless, the fact that he did not cross-reference the note referred to above is not sufficient evidence that he was unaware that the account had been reviewed or that he admitted the statement to that effect attributed to him in the specification. The Board finds this specification, 1b(2) (c), not sustained.

Specification 1b(2) (d) reads as follows:

> (d) *Accruals.* Some of the accounts had large amounts of accruals and when asked whether or not these were acceptable accruals or estimates, you stated you did not know and probably would need to look at some of them.

The appellee did not mention this specification in his reply. In his appeal to the region he mentioned accruals to the following extent: "Journal entries also include accruals. [The Resident Auditor] has never understood accrual accounting." The evidence with respect to this item was furnished by the Agency with its representations to the Board and it shows that several of the overhead accounts had large amounts of accruals. However, the thrust of the specification is that the appellee stated that he did not know whether or not the amounts were acceptable accruals or estimates and probably would need to look at some of them.

The record contains no evidence that the appellee made such a statement, and since he does not admit that he did so, the Board finds this specification not sustained.

Specification 1b(2) (e) reads as follows:

> (e) *Insurance.* Although the auditor had prepared a schedule of insurance, you were unable to provide an explanation as to why we had accepted what was covered by each policy and/or whether some of the policies were peculiar to the contractor's commercial work or were incurred for specific contracts.

The Board agrees with the Dallas Region that this specification is sustained on the basis of the appellee's acknowledgment in his reply that he "overlooked this item."

Specification 1b(2) (f) reads as follows:

> (f) *Engineering Supplies.* Since a large amount of the "Engineering Supply Account" consisted of reproduction expenses, the auditor looked at one month of reproduction expenses. His workpapers indicated that almost ten percent of the expenses related to Bidding and Proposal costs. The auditor, being a trainee, believed the contractor's explanation that this was normal overhead and dropped the issue. When I asked you whether you had agreed with this, you stated that you were completely unaware of the matter.

In his reply the appellee denied that the Bidding and Proposal entries were not reviewed and questioned. He acknowledged that he did not review the work papers as thoroughly as he might have. He stated further that he placed a lot of reliance on the subordinate auditor who had done the work because he was experienced in overhead work. This admission, however, is not an admission that the appellee had stated that he was completely unaware of the matter, and there is no evidence in the record to support the allegation in the specification that he was completely unaware of the matter and so stated. The Board finds this specification not sustained.

Specification 1b(4) relates that with respect to certain specified assignments, the appellee had not furnished the results of audit nor had he reported why they were late, their current status, or their anticipated completion date although requested to do so. Specification 2b(1) relates that the appellee made no effort to complete assignment 2402.2001, that over 100 hours had been expended on the assignment, and that although the Resident Auditor discussed the assignment with the appellee in May and August 1972, no work hours had been expended since October 31, 1971. The Region found Specification 1b(4) and 2b(1) sustained and the Board is in agreement with the Region's analysis and findings with respect to these specifications.

Specification 3b(1) reads as follows:

> (1) *Assignment 3432.2004, Post Award Review under Prime Contract F34601-70-C 2772.* The request was received September 13, 1971. There is no evidence in the file or workpapers that you instructed the auditors under your direct supervision at the beginning as to what would be required; however, the request for audit gave extensive details on problem areas. You advised me that the audit was complete July 24, 1972, and you briefed me on the results of the audit on July 31, 1972. Your draft report and presentations was inadequate because you had failed to perform all required aspects of the audit. For example, the labor hours and scope was lacking; you had not compared the actual labor hours with the forecasted loading hours based on manloading; and, you failed to acquire the actual cost of the computer operation, even though this information was available.

The Region sustained only that portion of this specification that charged the appellee with having failed to include the computer cost. The other parts of the specification charging him with failure to properly instruct the auditors and with inadequacy of draft report because of failure to include the labor hours and scope were found not sustained by the Region. The Region noted that the appellee's affidavit before the Commission's investigator gave a detailed rebuttal with respect to this specification, whereas the Agency had submitted no work papers or other documentation, only the Resident Auditor's conclusions.

In its representations to the Board the Agency stated that "workpapers in support of this charge were available to the Civil Service Commission Representative, but he apparently did not identify these as pertinent to the issue." The Agency submitted a statement by one of the subordinate auditors that he "did not recall" receiving instructions from the appellee until after the completion of the initial audit in January 1972. The Agency also submitted a copy of reviewer's notes prepared by the appellee, with comments thereon by the subordinate auditor referencing various workpapers and other documents.

The Board agrees with the Region that other than that portion of this specification charging failure to include the computer cost, the specification was not supported by the evidence before the Region. In regard to the availability of workpapers and other documents which the Agency states were available to the Commission's representative but were not obtained, it was the Agency's responsibility to submit whatever evidence it wished to rely on to support the adverse action. We note that the Chief, Personnel Division, Atlanta Region, DCAA, stated under date of March 14, 1973 –

> I have this date reviewed in detail the investigative file as presented to me by Mr. James McBrien, Civil Service Investigator from the Atlanta Regional Office of the Civil Service Commission, and do not desire to make any additional remarks. The file reflects the Agency's reasons and position for effecting the separation action of [the appellee].

The Board finds that the additional evidence furnished with the Agency's representations to the Board in regard to this specification does not provide a sufficient basis for overruling the Region's findings. The subordinate auditor's statement that he does not recall receiving instructions does not weigh as heavily as the appellee's affidavit that instructions were given. The review notes are not accompanied by the workpapers or other documents referred to by the subordinate auditor. Alone, the reviewers notes are of little or no value as evidence in this case. The Board finds, as did the Region, that the sustained portion of the specification, that pertaining to computer cost, is insufficient to sustain the specification as a whole.

In regard to Specification 3b(2), the Region read the specification as charging the appellee with being unable to explain the Agency's reason for disagreeing with a change in the contractors accounting system to provide for two separate rates with respect to material overhead. The Region found that the appellee was being charged with inability to explain "our reason" and therefore found the specification not sustained. In its representations to the Board the Agency contends that the appellee, in his capacity as auditor in charge of the assignment, should have been able to explain the Agency's position, which, according to the Agency, stemmed from one of the prime reasons for DCAA examination of contractor accounting systems. The record

contains a copy of a draft of a letter of explanation to the contractor. The draft was prepared by the appellee and was rejected as incomplete by the Resident Auditor, who ultimately wrote the letter in final form himself. On the basis of the evidence with respect to this specification, the Board finds that it is sustained.

Specification 4b(1) reads as follows:

> *b. Evidence of Unsatisfactory Performance:*
>
> (1) Draft audit reports completed by the auditors assigned to your team are not always edited by you. As a result, reports submitted for release are not in accordance with sound accounting and auditing techniques and CAM and do not give full disclosure.

This is followed by examples (a) through (d). The charge here is that draft audit reports completed by the auditors were not always edited by the appellee. Examples (c) and (d) do not support this specification, since neither is concerned with an audit report and neither is concerned with anything prepared by an auditor assigned to the appellee's team. In regard to (a) and (b), while these are concerned with audit reports, the examples do not allege that the appellee failed to edit the reports and in any event there is no evidence in the record that he did not edit them. In his reply the appellee denied that he did not edit audit reports. The Board finds, therefore, that Specification 4b(1) is not sustained for lack of evidence with respect to examples (a) and (b) and because examples (c) and (d) are not examples of failure on the appellee's part to edit audit reports completed by his auditors.

In summary, the Board has sustained Specifications 1b(1), 1b(2) (a) and (e), and 1b(4); 2b(1); 3b(1) in part, and 3b (2). The Board has found no part of Specification 4 sustained.

Of the four main specifications, the Board finds that the counts which it has found sustained under each of Specification 1, 2, and 3 are sufficient to sustain those specifications, which in turn sustain the charge that the appellee failed to perform his duties in accordance with requirements. On the basis of the sustained charges, the Board finds that the appellee's separation from the rolls was not arbitrary, capricious, or unreasonable, but was warranted and effected for such cause as to promote the efficiency of the service.

DECISION

The Dallas Region's decision is reversed and the corrective action recommendation contained in that decision is withdrawn.

For the Commissioners:

/s/William P. Berzak
William P. Berzak
Chairman

September 24, 1973

APPENDIX D

UNITED STATES CIVIL SERVICE COMMISSION
DALLAS REGION, DALLAS, TEXAS

APPEAL OF MR. JOHN Q. THOMPSON UNDER SUBPART B OF 752 OF THE CIVIL SERVICE COMMISSION REGULATIONS

PART I. INTRODUCTION

Mr. John Q. Thompson, 4931 Live Oak, Apt. 105B, Dallas, Texas appealed to the Civil Service Commission from a personnel action accomplished by the Defense Contract Audit Agency, Atlanta, Georgia, removing him from the position of Auditor, GS-12, $17,987 per annum, on November 17, 1972.

Mr. Thompson presented satisfactory evidence of his entitlement to appeal to the Civil Service Commission. He has a competitive status and he has completed a probationary period. The adverse action appealed, a removal accomplished by the administrative officer so acting, falls within the purview of the regulations. The appeal was filed within the Commission's established time limit.

The appellant did not file an administrative appeal but elected to present his case to the Civil Service Commission. Following the investigation of his appeal, he was informed of his rights to a hearing, but requested that his appeal be adjudicated on the basis of the evidence of record without a personal appearance before the Commission.

PART II. ANALYSIS AND FINDINGS

By letter dated October 6, 1972, Mr. Thompson was advised of a proposed personnel action which would remove him from the Government service. This document, signed

by Mr. Peter C. Van DerVeen, Resident Auditor, E-Systems Inc. Residence Office, Defense Contract Audit Agency informed the appellant that his removal was being sought on charges that read as follows:

> "You are hereby notified that I proposed to remove you from your position of Auditor, GS-510-12, $17,982 per annum, with DCAA not earlier than 30 calendar days from the date of your receipt of this notice. As Auditor-in-Charge of the E-Systems Suboffices - Garland, you have failed to perform your duties in accordance with requirements. The specific reasons supporting my proposed action follows:
>
> 1. *Task: Plans and performs audit assignments.*
>
> a. Performance Standard – Must be capable of planning, programming and reviewing workpapers, of a moderately complex assignment. Must resolve technical problems encountered in the audit assignment and accomplish objectives and complete assignments in a timely and economical manner.
>
> b. *Evidence of Unsatisfactory Performance:*
>
> (1) Assignment 2105.2003. Incentive Price Redetermination, Contract N600-19-62121. On January 14, 1972, a request from the NAVPRO, Dallas was received for an audit report on final price redetermination under an incentive contract. You prepared an assignment, budgeted 12 hours, and assigned it to Mr. Al Dumas, Auditor, GS-11. Your estimate was completely inadequate for a price redetermination. You also did not receive a proposal from the contractor and should not

> have assigned the job. On March 3, 1972, when I became aware of this, I had to mail an acknowlment to the ACO stating that we had not received the contractor's proposal. On that day we discussed whether you were aware of the requirements for an incentive price redetermination audit. You assured me you were; however, you could not explain why only 12 hours were budgeted. On April 26, 1972, the contractor's proposal was received and you prepared a new assignment No. 2105.2007. It was noted that Mr. O. Gene Reeves was assigned; however, he was not told that some work had previously been done, causing duplication of effort. On August 2, 1972, I discussed the progress of this assignment with you and you were unaware that the final price on a Fixed Incentive Contract is based on allowable incurred costs to be negotiated at completion of the contract. You stated during our discussion that you understood that the auditor to which you assigned the work had some prior experience in redetermination, and you were sure he would know what the requirements were. You were unable to explain to me how you would determine whether what he did was adequate and how you could supervise his work if you yourself did not know the requirements. The lack of technical knowledge and control on this assignment on your part resulted in poor planning, lack of adequate interim reviews, and unnecessary and substantial delays in starting and completing the audit.
>
> (2) *Assignment 2104.2001 1969 Overhead.* A total of 426 hours were spent through June 30, 1972 on this assignment. Beginning in January

1972, I have frequently reminded you of the importance of completing this assignment. After continuously asking you for a briefing on the status, you discussed the work on August 28, 1972. We specifically went over the material burden, manufacturing overhead, and engineering overhead. At the outset, you were unable to furnish me with your program on how you had proceeded in planning and performing the audit. You had no comment when I asked you how Mr. James Bratcher knew what to cover, especially since he was an Accountant (Auditor) Trainee, GS-7. There was no indication that you had made interim reviews and/or provided any specific supervision to the auditor trainee. When I asked Mr. Bratcher, in your presence if he had received written instructions and/or assistance to prepare his program, he said that he had not received instructions from you and that he had prepared the audit program on his own the best he knew how. You did not disagree with his comments. When asked whether you had completed your review of the workpapers, you specifically stated that you had reviewed them thoroughly, concluded that the audit was complete, and considered the coverage adequate. The following is a summary of the findings discussed which evidences, on your part, inadequate review and supervisory control of this assignment.

(a) *Bases for allocation.* When questioned as to what audit steps had been performed in ascertaining the reasonableness of the distribution bases (materials; direct engineering labor; direct manufacturing labor; and, cost additions), you didn't know

and the auditor stated that it had not been included in his assignment.

(b) *Expenses other than Voucher Register Entrees.* A substantial amount of expenses in the various accounts did not specifically come from the Voucher Register. The audit workpapers, however, indicated that only the amounts charged through the Voucher Register were reviewed. You expressed great surprise and stated that you had completely relied upon the accounts payable sampling as being the total account. When questioned whether you had noticed this during your review, which you had stated at the start of this meeting had been very thorough, you didn't have an answer.

(c) *Rental Accounts.* Since the Garland Facility owns most of its real estate, the overall rental charges included in the various overhead accounts appeard out of line. When questioned whether you had obtained a listing of the real estate or other items being rented and how it was allocated you stated that you did not know what the rent was for and probably would have to do some more work in this area.

(d) *Accruals.* Some of the accounts had large amounts of accruals and when asked whether or not these were acceptable accruals or estimates, you stated you did not know and probably would need to look at some of them.

(e) *Insurance.* Although the auditor had prepared a schedule of insurance, you were unable to provide an explanation as to why we had accepted what was covered by each policy and/or whether

some of the policies were peculiar to the contractor's commercial work or were incurred for specific contracts.

(f) *Engineering Supplies.* Since a large amount of the "Engineering Supply Account" consisted of reproduction expenses, the auditor looked at one month of reproduction expense. His workpapers indicated that almost ten percent of the expenses related to Bidding and Proposal costs. The auditor, being a trainee, believed the contractor's explanation that this was normal overhead and dropped the issue. When I asked you whether you had agreed with this, you stated that you were completely unaware of the matter.

At the conclusion of this discussion, I told you that I was disappointed by the lack of knowledge you had on the above items and that I could not reconcile myself to the fact that you had reviewed the workpapers either during the audit or at completion. With respect to adequate supporting work papers, I told you that several areas such as operating expenses, expendable tools, travel, and planned and office rearrangements were very poorly documented, with respect to the total work performed and the vouchers selected by the sampling method. You agreed but could not explain why you had not properly instructed the Auditor trainee assigned to do the work.

(3) Since April 1972, you have been reminded on numerous occasions that I would like to review the status of the following assignments, listed by times budgeted, actual time charged, and period audit hours expended in Fiscal Year 1972.

Assignment		*Budget*	*Actual*	*Expended*
2402.2002	Post Award Review on AN/AWN-13 Test Set, Contract F41603-C503	150	163	Jan-Apr
2104.2009	1968 Overhead	200	266	Apr-Jun
2104.2005	1969 Journal Entries	32	61	Mar-Apr
2104.2002	1970 Overhead	400	326	Jul-Jun

A total of 816 hours has been spent on these assignments. Each time I ask you if one of these assignments is ready for review, you indicate that it is, except for a few minor details. As of September 18, 1972, however, you have not discussed these assignments with me.

(4) As of September 18, 1972, you had not furnished the results of audit on the following assignments, nor have you reported why they are late, what the current status is, or the anticipated completion date, even though I have requested such information orally on several occasions as well as in writing on May 30, 1972.

Completed	*Assignment*		*Budget*	*Actual*
Sep. 1971	2103.2001	Perform Floor Check in the Mfg. Areas	60	90
Dec. 1971	2102.2005	Assist Procurement Review Team	60	82
Apr. 1972	3131.2016	Assist DCASR in Salary Review	60	58
Mar. 1972	3131.2014	1970 Overhead	160	73

June 1972	3131.2010	1969 Corporate Allocations	40	40
Dec. 1972	3131.2007	Floor Check in Model Shop	80	26
Dec. 1972	3131.2008	Floor Check in Model Shop	40	27
Mar. 1972	3131.2011	Sale of Computer Programs by Resalab to LTVE	80	56

2. *Task: Drafts advisory report of audit findings.*

a. Performance Standards: Draft audit reports should be responsive to the specific audit request. They must be objective, timely, accurate, and meet DCAA reporting standards. Must also furnish oral advice of audit findings as necessary, to meet limitations or to supplement written reports.

b. *Evidence of Unsatisfactory Performance:*

(1) Assignment 2402.2001, Post Award Review Under Contract F-33657-69-C 0195, Interdivisional Effort from Greenville, Texas. In July of 1971 you submitted your workpapers for my final review. They were returned for additional work on July 29, 1971, you submitted a draft report; again it was not acceptable. The assignment was discussed again in November and December 1971. I brought this to your attention in my letters of February 29 and April 26, 1972. In our discussion in May 1972 and August 2, 1972, you stated that you could not remember what you were going to do. You have made no effort to complete this assignment and the records indicate no work hours have been incurred since October 31, 1971. A total of 50 hours was budgeted for this assignment. Over 100 hours have been incurred.

(2) Assignment 2102.2001, Functional Review of Material Requirements. During review of the draft audit report relative to this assignment, a number of questions arose as to the validity and aptness of presentation of the audit findings. Accordingly, I began to trace the individual finding areas back into the supporting workpapers. In reviewing your workpapers there was no evidence in the file that you provided the auditor interim guidance or constructive review. It appeared that as the auditor explained individual findings, you wrote additional assignments and budgeted additional hours. The assignment sheets did not reflect any indication of guidance of how to perform and complete the audit to your satisfaction. The only involvement on your part reflected an after-the-fact review. When questioned by me on the findings in May 1972, you were unable to explain anything other than what was in the draft report of the auditor. It was apparent that you had made no effort to bring the draft report, as originally submitted to you by the auditor, up to Agency standards.

3. *Task: As Auditor-in-Charge, directs the activities of auditor staff members who may be assigned to assist in the performance of the audit.*

a. Performance Standard: Perform on site direction of assigned staff, consisting of four GS-11 auditors, one GS-9 auditor, and one GS-4 clerk-typist. Guides the activities of subordinates, reviews their work and resolves technical audit problems. A key attribute necessary for the professional competence of a senior auditor is the ability to maintain a high

level of professional competence by example and guidance of subordinates.

b. *Evidence of Unsatisfactory Performance.*

(1) Assignment 3432.2004, Post Award Review under Prime contract F34601-70-C 2772. The request was received September 13, 1971. There is no evidence in the file or workpapers that you instructed the auditors under your direct supervision at the beginning as to what would be required; however, the request for audit gave extensive details on problems areas. You advised me that the audit was complete July 24, 1972, and you briefed me on the results of the audit on July 31, 1972. Your draft report and presentation was inadequate because you had failed to perform all required aspects of the audit. For example, the labor hours and scope was lacking; you had not compared the actual labor hours with the forecasted loading hours based on manloadings; and, you failed to acquire the actual cost of the computer operation, even though this information was available.

(2) Assignment 3231.2011, Forward Pricing Rates with Continental. On March 22, 1972, you arranged for a conference with contractor personnel for the purpose of discussing findings and recommendations for forward pricing rates. Since you stated you were involved actively in this audit and had reviewed and agreed with the findings, you requested that you be permitted to lead the discussion for our office. You were not able to answer the contractor's questions and had to turn to the auditor and ask him to explain the results of the audit.

In one specific incident where we took exception to the contractor's proposed change in the

accounting system for allocating material handling, you could not explain our reason for not accepting the system. I had to explain our determination and the effect of this change on future costing of contracts audited by our office. After an extensive discussion, we agreed that if the contractor insisted on using the new method we would include comments that the system would not be acceptable. The next day you again discussed this problem with contractor personnel and left the impression we now agreed with the new system, even though I had stated the previous day that it was not acceptable.

4. *Task: Drafts or is responsible for advisory reports of audit findings, conclusions and recommendations to procurement officials or contracting officers.*

a. Performance Standard: Must be able to prepare or edit audit reports to the extent that they provide full disclosure of audit results, or objectives, in line with appropriate accounting methods and conform to DCAA reporting standards as set forth in the Contract Audit Manual.

b. *Evidence of Unsatisfactory Performance:*

(1) Draft audit reports completed by the auditors assigned to your team are not always edited by you. As a result, reports submitted for release are not in accordance with sound accounting and auditing techniques and CAM and do not give full disclosure. For example:

(a) Audit Report M6-03-2-0171 (assignment 2204.2018) dated May 16, 1972. You questioned 3,259 labor hours (Engineering & Manufacturing)

based on historical cost data according to the comments in the report. You do not explain, however, what the actual cost data was, or show how the projection was made from the historical cost data to the audit recommendations. When I discussed this with you in May 1972, you agreed that the report did not give sufficient disclosure to be useful to a negotiator. Since the report was due, I added a recommendation in the report that an auditor attend the negotiation to present the historical data.

(b) Audit Report 116-03-3-0004 (assignment 2202.3001) dated July 12, 1972. You questioned $467,523 for materials, 40,145 Engineering hours, and 64,178 manufacturing hours. The explanation for these significant hours questioned consisted of a few general notes. Disclosure was not made of the items included in our review; historical cost data used and referred to in the notes was not identified; and neither was the computations shown on the projected portions of the hours. When I discussed this with you on July 12, 1972, you agreed that it would be virtually impossible for any negotiator to sustain our findings or effectively use our report without having substantially more of the details on which our findings were based.

(c) On June 12, 1972, a meeting was held with CEMCO personnel relative to corporate office allocations from Resolab, Inc. We discussed the matter and a general agreement was reached on the method to be used. On June 14, 1972, we received CEMCO's memorandum of the allocation to be implemented. I forwarded the memo to you

for comment and you returned it on a route slip with a "I do not concur." When questioned as to why you did not concur and what action you proposed to recommend, you were evasive. After several verbal requests and no reply, I sent you a memorandum on July 14, 1972, requesting that you document your basis for disagreement and draft a letter to CEMCO outlining our objections. As of August 31, 1972, you had neither completed this assignment, nor informed me of the status.

(d) You placed an undated draft memorandum on my desk on August 25, 1972, addressed to the Resident Auditor, Lockheed. The memorandum was not clear as to why purchases on a subcontract relating to the Garland Division cannot be solved locally. It does not explain what the basis for the purchases were, nor does it explain the subcontractor's basis for purchases.

In an attempt to improve your performance, you were advised by the undersigned in letters dated February 29, April 26, and May 30, 1972, of the performance condition that existed, given constructive guidance as to needed improvements, and advised that I was personally available to assist in any problem area.

You have failed to take advantage of objective and constructive criticism as a means to improve your performance. You have continued to rebut your supervisor's reviews in an objectional and nonprofessional manner. Specifically, I have reference to your written rebuttals dated April 29 and May 30, 1972, your undated response to my May 30 letter.

For the reasons stated above and because the numerous discussions with you have not improved your performance, my only recourse is to propose your removal from your position to promote the efficiency of the agency."

Appellant was given 10 calendar days in which respond to the agency notice letter, and under date of October 14, 1972 he submitted a written response. After consideration of the reply, Mr. Van DerVeen, signed a decision in the case on November 3, 1972. This document, received by Mr. Thompson on November 3, 1972 informed him that:

"Your written reply of October 14, 1972 has been fully and carefully considered. Although you have the credentials stated in your letter of reply – i.e., Degree Certified Public Accountant Certificate, excellent performance ratings in the past – you have not demonstrated "since your last rating of January 17, 1972" your effectiveness in utilizing these assets in performing and directing the work required of an Auditor-in-Charge, based on the established standards of performance. You have not displayed the leadership ability necessary to provide guidance for a professional group performing highly technical cost audits. You have not displayed confidence in your over all planning programming or in the review of the work performed by auditors under your supervision.

The audit is the completed work product for which you are held responsible. You have not demonstrated the necessary attention to provide me, on a timely, accurate, and responsive basis either orally or in writing– with the advisory report of audit findings.

I find, therefore, that the charge of failure to perform your duties in accordance with requirement is fully supported by the evidence and warrants your removal to promote the efficiency of the service. It is my decision that you be removed from the service effective November 10, 1972."

By letter dated November 10, 1972, and received by the appellant on November 14, 1972, the appellant was advised that the effective date of the removal action was postponed to November 17, 1972. The letter confirmed a telephone conversation with the appellant on November 10, 1972.

Mr. Thompson was notified of his appeal rights in the matter and was retained in an active duty status during the advance written notice period. In accordance with the terms of the November 10, 1972 letter, the appellant was separated from the service on November 17, 1972.

Concerning the procedural aspects of this case, we conclude that the following specifications fail in their entirety, to meet the criteria as to specificity and detail and will be commented on separately in the following paragraphs:

SPECIFICATIONS:

1.b(2) (d)
1.b(2) (f)
1.b(3)
2.b(2)
4.b(1) (a)

Concerning specification 1.b(2) (d), it is noted that this specification relates to "some" of the accounts, and a "large amount". As the agency did not state specifically which accounts had "large" amounts of accruals, we do not feel that the appellant could properly join issue. Thus, no fur-

ther consideration will be given to this specification, as it does not meet the requirements for specificity and detail, because of its failure to properly identify the accounts in question.

Concerning the specification 1b(2) (f), concerning Engineering Supplies, it is noted that this specification refers to "a large amount concerning reproduction expenses," that the auditor looked at "one month" of reproduction expense, and "the auditor" believed the contractor's explanation. This specification failed to identify "the auditor", did not elaborate on the "large amount" at question, and did not identify which "one month" period was analyzed. Furthermore, the specification fails to state a specific job deficiency, on the part of the appellant, in connection with this specification.

Specification 1.b(3), states that the appellant had been reminded on "numerous occasions" that it was desirable that a review of the status of the certain specified assignments be reviewed as to their status. The specification further relates that the appellant, when asked whether the assignments were ready for review, stated that they were except a few minor details. The specification concluded that as of September 18, 1972 the appellant had not discussed those assignments, as requested.

In reviewing the specification, it is noted that the appellant is charged with not discussing those items or assignments mentioned in the specifications. This is in conflict with the preceding sentence, which states "each time I ask you if one of these assignments is ready for review you indicate that it is, except for a few minor details." Additionally, the specification is silent as to what type of discussion was required of the appellant, such as whether it was to be

verbal or in writing, or whether the discussion was to have been in the form of a preliminary audit report. We feel that, because of the vagueness of this specification and the absence of a specific cause of action, the entire specification fails and will be given no further consideration.

Concerning specification 2.b(2), it is noted that this specification, concerning assignment 2102.2001, states that a review of the draft audit report for the assignment raised a "number of questions;" "that the individual findings" were traced back into the supporting workpapers; that the assignment sheets did not reflect "any indication of guidance of how to perform and complete the audit to your satisfaction"; and that the appellant had made no effort to bring the draft report, as originally submitted, "up to agency standards". The specification is silent as to what questions arose, which individual findings were an issue, how the appellant was to make notations in the workpaper of what he expected, and what questions the appellant was unable to explain. The specification does not state the "agency standards" which the report failed to meet. In view of the above, this specification fails to meet the specificity and detail requirements as the appellant was not advised in sufficient detail to properly respond to the allegations made in the specification.

As to specification 4.b(1) (a) the agency failed to state a cause of action in this specification. The agency's notice document did not set forth, in sufficient detail, the alleged deficiencies concerning this audit report. Thus, the appellant did not have a proper opportunity for rebuttal.

This notice document, previously quoted, contain the following two paragraphs:

"In attempt to improve your performance you were advised by the undersigned in letters dated February 29, April 26, and May 30, 1972 of the performance condition that existed, giving constructive guidance as to needed improvements, and advised that I was personally available to assist in any problem.

You have failed to take advantage of objective and constructive criticism as a means to improve your performance. You have continued to rebut your supervisor's review in an objectional and non-professional manner. Specifically I have reference to your written rebuttals dated April 29, and May 30, 1972, your undated response to my May 30 letter."

The first paragraph, quoted above, is a conclusion and it does not contain a specification or charge against the appellant. Additionally, the reference to the letters dated February 29, April 29, and May 30, 1972 were not attached to the notice document.

Concerning quoted paragraph No. 2 above, the agency failed to state which part of the appellant's rebuttals were "objectionable and non-professional". Thus, these items, if it is considered to be a specification, must fail for lack of specificity and detail. The appellant was not afforded an opportunity to rebut this issue, as he was not advised in detail as to which "rebuttals" were "objectionable and non-professional."

Specification 3.b(2), consisting of two paragraphs, is also considered to be, in part, lacking in specificity and detail. It is noted that paragraph No. 1 charges the appellant with not being able to answer the contractor's questions. The

specification is silent as to what questions the appellant was unable to answer. Further, this specification does not, as written, contain a proper cause of action.

Paragraph 2 makes reference to "our determination"; an "extensive discussion" a "new method", and "the system". The appellant would not be able to respond to this specification, and properly defend himself, as the "new method" is not explained or defined. The specification also indicates that the appellant "left the impression" that he agreed with the "new system", but does not state what was said or done by the appellant that gave that impression. The only portion of this specification which can be considered from the merit standpoint, is that part set forth in sentences 1-3 of paragraph 2. No further consideration will be given to this specification, other than sentences 1-3 of paragraph 2.

Except for the above eight specifically mentioned specification, or parts thereof, we must conclude that the agency has complied with the procedural requirements of controlling regulations. Thus, the merits of the case must be considered.

In the specification 1b(1), relating to assignment No. 2105.2003, concerning Incentive Price Redetermination, the agency makes reference to Contract No. N600-19-6-2121, and mentions various alleged deficiencies of the appellant in connection with this contract and assignment.

The appellant contended that Mr. Van DerVeen is confused in this specification, as assignment 2105.2003 and 2105.2007 are concerned with Contract F33657-69-C-0844, rather than contract No. N600-19-62121, as cited in the notice document.

Exhibits No. 23 and No. 24, contained in the appeal file, are concerned with Assignments No. 2105.2003 and No.

2105.2007, respectively. It is noted that the "Description of Assignment," both exhibits are concerned with contract F33657-69-C0844, rather than the contract referenced by the agency in their notice document.

As the agency cited the wrong contract, the appellant was not afforded a reasonable opportunity to answer the specification. Thus, this specification must fail.

As to specification 1.b(2).a, the appellant stated, in his October 14, 1972 response to the notice document that "I must confess that I was shocked that the bases had not been reconciled and that I had not detected that fact." In his affidavit of February 12, 1972 the appellant stated that he had discussed the matter with Auditor Reeves; that it was determined that verification of the bases was necessary; and that Mr. Reeves did not get around to that verification. Mr. Thompson concluded the audit was 95% complete when this omission was discovered, and that the verification was performed subsequent to August 28, 1972.

The agency contended, by letter dated December 8, 1972 from Supervisor Van DerVeen, that the appellant is attempting to blame the assigned auditor for the omission, while not recognizing that he, the appellant, is the team leader and approves audit programs, makes interim reviews, furnishes guidance, etc.

Based upon the above, we must conclude that specification 1.b(2) (a) is sustained. The appellant acknowledges that the work in question was not performed until subsequent to August 28, 1972.

Concerning specification 1.b(2) (b), the appellant stated that assignment 2104.2005, Review of 1969 Journal Entries,

was set up in March 1972, with the review being completed in April 1972. The appellant stated, in his October 14, 1972 letter that "As you know journal entries also includes accruals."

The agency contends that the appellant conducted himself exactly as alleged.

We have reviewed the documents submitted by the agency in support of the specification. After reviewing the documents, it does not appear that the agency's contention is properly documented, other than by what is alleged by the agency in the notice document. As the burden of proof is upon the agency, we do not find this specification to be supported by the evidence of record.

Concerning specification 1.b(2) (c), relating to Rental Accounts, the appellant contended that he personally reviewed the account; that Mr. Van DerVeen's accusation is an untruth; and that the real property rental listing was made on May 5, 1971. He included, in his appeal, a copy of a document entitled Rent-Real Property Account X755, 1969, relating to assignment No. 217.601. That paper was prepared May 3, 1971.

Mr. Van DerVeen commented that, since their August 28, 1972, meeting, Mr. Thompson did discuss this item with Auditor Gene Reeves and that, sometime in September, he did explain the procedure. He related that Mr. Thompson does indicate that he did review this item, after it was brought to his attention.

It is noted that the appellant is not charged with having failed to obtain certain information. He is charged with, when questioned by his supervisor about the audit, not knowing the data included in the audit. This is not miti-

gated by the fact that a workpaper was prepared prior to the date in question. The issue is whether or not the appellant was aware of it.

Again, the burden of proof is on the agency. The agency concluded the appellant was unaware of the data and the appellant called this an untruth. In the absence of any supporting documentation or corroborating testimony, this specification cannot be sustained.

As specification 1.b(2) (e), concerning "Insurance", the appellant stated that the workpaper in question was prepared by Mr. Gene Reeves, and related that his review of the schedule revealed one policy that might possibly contain some unallowable coverage. He stated that "I will acknowledge, however, that I *overlooked* the item." In his appeal letter to the Commission, the appellant stated that the Insurance schedule was prepared by Mr. Reeves and that schedule, Exhibit H, includes an explanation of each policy.

Based upon the appellant's statements and the other evidence of record, we find this specification to be sustained.

Specification (d), and (f), were previously omitted from a further consideration because of lack of specificity and detail. Specifications (a) and (e) have been sustained by evidence of record. Specifications (b) and (c) were not supported by evidence of record.

Specification 1.b(3) has previously been considered and determined to be lacking in specificity and detail. Therefore, no further comments will be made concerning this specification.

Specification 1.b(4), Mr. Thompson stated, concerning assignment 2103.2001, that this assignment was discussed with Mr. Van DerVeen on numerous occasions; that there were no findings; that since the assignment was programmed he frequently

asked for permission to "write off some dollars and you always refused. Remember?" Appellant contended that positive or negative audit reports should be reported in the quarterly performance report to the Atlanta Regional Office.

Concerning assignment 2102.2005, the appellant has stated that a report was written on this assignment and that he is "almost sure" the report was placed on Mr. Van DerVeen's desk. Further, he related that Mr. Rubio assisted in the procurement review and that Mr. Rubio's findings were incorporated in the report.

Concerning assignment 3131.2016, the appellant stated that this particular review was completed "many months ago" and that a report had been written. Mr. Thompson subsequently stated that the report was written on July 20, 1972.

As to assignments 3131.2014, 3131.2010, 3131.2007, 3131.2008, and 3131.2011, Mr. Thompson stated that the first two assignments are not complete; that the next two assignments were given to Auditor Reeves for further investigation in connection with one of his audits; and that the final assignment, 3131.2011, has been completed but not "wrapped up". He stated that there were no "findings" in assignment 3131.2011.

The appellant's supervisor stated, concerning assignment 2103.2001, that the appellant carefully refrained from stating that the workpapers and findings were submitted; that he had advised the appellant that before he could agree on the dollar amount to be charged off, he wished to see the assignment along with the findings and conclusions. He recalled that Mr. Thompson stated that there were no findings, but would try to locate the workpapers involved. In each occasion he failed to do so. He further stated that during the last quarter, ending September 30, 1972,

he specifically reminded Mr. Thompson of this assignment and that he had asked for the assignment from Mr. Thompson on several prior occasions. Mr. Van DerVeen recalled that Mr. Thompson "said that the work done probably was not very good, and he could not explain what was done nor did he want me to look at the workpapers."

Concerning assignment 2105.2005, Mr. Van DerVeen stated that there is no evidence of a report having been issued.

As to assignment No. 3131.2016, Mr. Van DerVeen concluded that Mr. Thompson "apparently held on to the folder and then filed it away without mailing a report."

As to the remaining five assignments set forth in the specification, Mr. Van DerVeen stated that Mr. Thompson had no comment except that Mr. Thompson wished to discuss those assignments verbally.

The appeal file contains a copy of a letter dated May 30, 1972 addressed to Mr. Thompson from Mr. Van DerVeen. It appears from the context of the letter, that the above cited assignments, except for 3131.2010 and 3131.2011, were brought to the appellants attention on May 30, 1972. The letter concluded that the appellant had failed to issue reports, inform the writer of the status of the assignments, and that the results and workpapers were not submitted to, or discussed with, Mr. Van DerVeen.

Included in the appeal file for each assignment mentioned above is a DCAA Form 7730-2 relating to the above assignments. The forms reveal that all assignments, except for 3131.2014 and 3131.2011 had "due dates" of April 30, 1972 or earlier. Additionally, assignment 2103.2001, 2102.2005 3131.2007 and 3131.2008 had the notation "completed" written in the "Remarks" section of the form. The record reflects that the last work was performed on assignment 2103.2001 in September 1971, and work on

the three remaining assignments was performed in December 1971. The last recorded work performed on assignments 3131.2016, 3131.2010, and 3131.2011 was indicated as April, June, and March 1972, respectively.

Based upon a preponderance of the evidence, we find that, with the exception of assignment 3131.2010 and 3131.2014, a preponderance of the evidence supports the agency's position. Thus, specification 1.b(4), is supported by the evidence of record.

Only specification 1b(2).(a), 1.b(2) (e) and 1.b(4) have been sustained by a preponderance of the evidence. Specification 1.b(2) is sustained only insofar as the appellant was not familiar with those two particular issues related in (a) and (e), with two exceptions. Specification 1.b(4) is supported by the evidence of record, and relates to advising of the status of certain assignments. However, we do not find, on the whole, that the agency has satisfactorily substantiated their position that the appellant was deficient and lacking in regard to his overall job performance concerning the standards in question. The preponderance of the evidence does not clearly support the agency's position, as is set forth in specification 1.

Concerning specification No. 2.b(1), relating to assignment 2402.2001, the appellant contends that this assignment was completed "many months ago" with no findings. He further contends that there is a memo for the file in the workpapers to that effect. He alleged that he has repeatedly asked Mr. Van DerVeen "what else to do and I received no guidance".

In an affidavit before a Commission representative, the appellant stated that this audit, in his opinion, was completed in either October or November 1971. He recalled that he instructed the auditor to prepare a memo for the file stat-

ing that there was no defective pricing based on further audit. He acknowledged that more hours were expended than originally budgeted because it appeared there was a "finding" on the diplexor, which promoted further investigation. He acknowledged that 113 hours were expended in this assignment.

Form DCAA7730.2 relating to assignment 2402.2001 reveals that the assignment was received on March 16, 1971 with a due date of August 1, 1971. The document further reveals that work was performed on the audit in July, September, and October 1971. The audit report was issued on October 21, 1971 and the audit number is reflected as 116-16-2-0074. Fifty hours were budgeted and one hundred thirteen (113) hours were expended.

Mr. Van DerVeen's letter, dated April 26, 1972 referenced assignment 2402.2001 and concluded "this assignment has been returned twice to you for further explanation (note also my comment on page 6 of my letter of February 29, 1972 on this same assignment). It is necessary that you complete and release this assignment as soon as possible." The appellant, in his response of April 29, 1972, concerning assignment 2402.2001, stated "we have discussed this assignment on more than one occasion and I thought it was agreed that there was no defective pricing."

By letter dated May 30, 1972, this assignment was again called to the appellant's attention and by response in an undated letter, the appellant made reference to this assignment giving his reasons for considering the post award review "not to be defective" for the three reasons, as related in his response.

Based upon the evidence of record, it must be concluded that a preponderance of the evidence supports the agency's specification. This takes into consideration the fact that

the appellant was placed on notice by his supervisor, in writing and on more than one occasion, that a corrected and undated report was expected on this assignment. There is no evidence in the file that a report of this nature was submitted, rewritten and/or corrected as requested. Thus, specification 2.b(1) is supported by a preponderance of the evidence.

In summary, specification 2.b(1) is sustained by preponderance of the evidence, and specification 2.b(2), as previously discussed, failed for lack of specificity and detail. Based upon the total record in this case, specification 2 is supported by a preponderance of the evidence.

Specification 3.b(1), concerning assignment 3432.2004, the appellant stated that he specifically advised Auditor Reeves orally of the steps to be taken in this audit; that Mr. Van DerVeen himself went to Mr. Reeves and gave instructions on the conduct of the audit; and that if anything was remiss it was because of the instructions Mr. Van DerVeen gave. He stated, in regard to not verifying the computer cost, that there was no need to verify the computer cost because Auditor Dumas had already verified this cost as being $375.00 per hour in September 1970. He recalled that the contractor had proposed only $100.00 per hour in June 1970.

The appellant also conceded that "actual hours on all tasks after negotiation were not obtained", but did recall asking Auditor Reeves to obtain the "costs" on the programmers. Appellant stated that their "objective was to prove that costs available at negotiation were not used."

In an affidavit submitted before a Commission representative, the appellant stated that actual hours, in dollars, were compared with proposed hours in dollars to date of defini-

tization in June 1970, which formed the basis for the claim of defective pricing. He further stated that the contractor knew that the date the contract was definitized and signed that his actual costs were less than his proposed costs, and constituted defective pricing. The contractor failed to disclose this information when he signed the contract. He stated that actual dollars were compared with proposed dollars each month following the signing of the contract. Furthermore, he restated that the computer cost was proposed as $100.00 an hour in June 1970 and that an audit in approximately August 1970 disclosed a cost of $375.00 per hour. He stated that he was not certain that this figure was documented in assignment 3432.2004, but that he knew this figure was acceptable because another auditor had verified the hourly computer cost in another assignment, which he verified. The appellant, by letter dated April 29, 1972 stated that this particular report has been reviewed and returned to the auditor to be rewritten. The appellant submitted, in support of his statements, Exhibit A (included in appeal file Exhibit 2) concerning Actual Versus Proposed labor.

The appellant's supervisor, by letter dated April 26, 1972 referenced contract F34601-70-C-2772 (assignment 3432. 2004) and concluded that the audit effort was completed in January 1972; that the assignment is in the appellant's office; that the auditor in the case indicated positive findings; and that the appellant has not furnished any information relative to the status or release date for this assignment.

By letter dated May 30, 1972, the appellant's supervisor advised the appellant that "you have failed to follow up and assist the auditor in completing the work to issue this report."

It appears that the appellant is, in this specification, considered to be deficient in two areas. One deals with the failure to properly instruct his auditors and the other is that the draft report as submitted, was inadequate because of failure to include in the assignment the proper scope of labor hours, and the failure to obtain the actual cost of the computer operations.

Concerning the first, item, it is noted that the appellant specifically stated that he did advise Mr. Reeves of the steps to be taken. In view of the fact that there is no documentation in the file to the contrary, except for Mr. Van DerVeen's conclusions, we do not find that the agency has properly supported their charge. Thus, this part of the specification must fail.

Concerning the issue that an inadequate report was prepared we concluded that, concerning the scope of labor hours, Exhibit A (attached to Exhibit 2 in the appeal file) shows the proposed labor hours as compared to actual labor hours. It also reflects the cost of proposed labor over actual cost. The agency did not submit any workpapers in support of their specification.

Concerning the issue of computer cost, the appellant has commented that he was aware of the actual cost per hour for the computer, even though he is not certain that this figure was documented in Assignment 3432.2004. Evidence of record does indicate that the appellant failed to include the computer cost in assignment 3432.2004, even though the information was available and known to the appellant.

In summary, we have concluded that evidence of record supports only the agency's charge that the appellant failed to include the actual cost of the computer in the assignment at question. The remaining portions of the specification are not supported, in our judgment, by the evidence of record.

Specification 3.b(2), in part, meets the specificity and detail requirements. That part, consisting of the first three (3) sentences of paragraph 2 relate to assignment 3231. 2011. That portion of the specification states "in one specific incident where we took exception to the contractor's proposed change in the accounting system for allocating material handling you could not explain our reason for not accepting the system."

Exhibit 34 contains a handwritten comment concerning the above issue. This document, prepared by Mr. Van DerVeen, reflects that significant time was devoted to the material overhead problem on assignment 3231.2011; that the agency disagreed with the contractor's proposed accounting system to provide for two separate rates; that he directed the appellant to write a confirming letter to identify the manner in which agency would recommend material handling, or how they understood the material allocation to be; and that the appellant was unable to present an adequate explanation to the agreed upon procedures to be used. Mr. Van DerVeen concluded that Mr. Thompson evaded the question posed of him and subsequently prepared the letter himself.

Based upon the available documentation, we do not feel that the agency has conclusively proved their case in this matter. It appears that the appellant is being charged with not being able to explain "our reason" for not accepting the system, whatever it may have been. Therefore, this specification cannot be sustained.

Specifications 3.b(1) was sustained only in part and specification 3.b(2) was not sustained by the evidence of record. The evidence, as presented does not, in our judgment sustain the agency's position. The one portion, pertaining to computer costs being omitted from assignment 3432.2004,

does not constitute a deficiency of such magnitude to sustain the entire specification. Accordingly, it is concluded that specification 3 is not supported by a preponderance of the evidence, and is therefore not sustained.

In connection with specification 4.b(1) (b), the appellant commented that the information should have been included in the report; that the information was however, available in the workpapers; and that "I agree, though, it should have been in the report."

The appellant subsequently stated, in his appeal to the Commission, that although these reports are not perfect they are certainly above average by any audit standards; that the quality of Pricing Evaluations Reports has improved since he transferred; and that the information is contained in the workpapers and is available "upon a simple telecon request from the buyer." In further explanation, Mr. Thompson, stated before a Commission representative, that this was a very voluminous and complex proposal with a short time limitation; that he readily admitted that it was desirable that all information in the file should have been included in the report; that he determined the condensed report was reasonable because of the time limitations imposed.

In view of the appellant's admission, we find the above specification to be supported by a preponderance of the evidence. The appellant acknowledged that the deleted information should have been included in the report. The importance of the omitted information is not mitigated, in its entirety, by the time factor imposed.

As to specification 4.b(1) (c), Mr. Thompson commented, on October 14, 1972, that the reason he did not concur was because the government would pick up a disproportionate share of a corporate officials expenses and Accounting

Department expenses. He related that this problem was later resolved and that he attached a note to Mr. Van Der Veen's memorandum so stating his concurrence.

On February 12, 1973, Mr. Thompson further elaborated on this issue. He stated that a Mr. Johnson was the newly elected president of RESLAB, Inc., and that he objected to the government paying a share of that salary. He recalled that the problem was resolved in August (1972) when the contractor agreed that none of Mr. Johnson's salary would be allocated to the government; that he advised Mr. Van DerVeen in approximately August 1972 that, as a result, he no longer objected to the company proposal. He stated that he felt sure that his concurrence "was prior to August 31, 1972", but that he does not have a copy of his letter to Mr. Van DerVeen relating this matter.

Again, as in previous instances, the burden of proof is on the agency. The appellant has acknowledged that he initially objected to the agency's plan and that his objection was subsequently withdrawn after the company changed their proposal. He, at that time, advised Mr. Van DerVeen that he no longer voiced any objections.

In summary, the agency has not refuted the appellant's belief that he submitted his response prior to August 31, 1972. The file is absent of any documentation in this matter. Thus, the specification is not supported by the evidence of record, and is therefore not sustained.

Concerning specification 4.b(1) (d), Mr. Thompson offered the following comments. In his letter of October 14, 1972, directed to Mr. Van DerVeen, Mr. Thompson stated "You had a memory lapse on this one. You suggested this yourself. Perhaps you changed your mind later and failed to tell me."

In his letter of appeal to the Commission, Mr. Thompson stated that the letter was requested by Mr. Van DerVeen. On February 12, 1973, Mr. Thompson elaborated by stating "While I do not recall the exact contents of the letter to Lockheed, I discussed the matter verbally with Mr. Van DerVeen after he found it to be unacceptable. I explained why I wrote the Lockheed Resident Auditor, which was because of the disappointing interview with personnel of E-Systems, Inc. It seemed to be the only alternative.

Mr. Van DerVeen related, in a document in the file, that the discussion in which he suggested correspondence with the Resident Auditor, Lockheed, pertained to documentation of a problem, including a final determination of allowable cost. The report would be submitted in sufficient detail so that their agency could prepare a formal disallowance on a prime contract. The deficiency in this charge relates to incompleteness of the memorandum, rather than at whose request the memorandum was prepared. The appellant is charged with having prepared the incomplete memorandum. However, as in preceeding specifications, the agency is required to prove their charges a preponderance of evidence. There is no documentation submitted by the agency in support of this specification. Thus, a preponderance of the evidence does not support this specification.

In summary, only specification 4.b(1) (b) is supported by a preponderance of the evidence. Specifications 4.b(1) (a), (c) and (d) failed either the test of specificity and detail or were not supported by a preponderance of evidence. The sustained specification, when considered in the light of the total specification, does not warrant sustaining the entire specification. For these reasons, specification 4 in its entirety, is not sustained.

Specification 2 has been sustained. Specifications 1, 3 and 4 have not been sustained by a preponderance of the evidence.

The sustained specification, No. 2, is concerned with the timeliness, objectivity, accuracy, and the meeting of reporting standards. The particular assignment in question, No. 2402.2001, was considered deficient in certain specified areas and the appellant's performance in connection with this same assignment was also considered to be lacking. However, after reviewing the entire file in this case it must be concluded that the sustained specification, while significant, does not warrant the appellants removal from the service.

PART III. DECISION

In view of the above finding, and since we do not believe the removal action will improve the efficiency of the service, the agency's action must be disapproved. It is recommended that the appellant be retroactively restored to the position from which he was removed.

PART IV. NOTIFICATION OF FURTHER APPEAL RIGHT

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U.S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U.S. Civil Service Commission
Washington, D.C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

Attached is CSC Form 942 providing more detailed information about further appeals to the Civil Service Commission's Board of Appeals and Review.

For the Regional Director

CHARLES K. TINKLER
Appeals Examiner

No. 78-943

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN Q. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of his dismissal from the Defense Contract Audit Agency (DCAA). He argues that the courts below did not apply the appropriate standard of review, that the penalty of dismissal was too harsh, and that the Civil Service Commission improperly considered extra-record evidence in making its decision.

1. Petitioner was a GS-12 auditor with the Defense Contract Audit Agency. After several warning letters he was notified on October 6, 1972, that DCAA intended to discharge him for failure to perform his duties in accordance with agency requirements (Pet. App. 11a). The letter notifying petitioner of his discharge discussed four general areas of deficiency and more than 20 specific assignments that petitioner had failed to complete satisfactorily (Pet. App. 32a-44a). Petitioner appealed the final discharge decision to the Dallas Regional Office of the Civil Service

Commission, which recommended that he be reinstated (Pet. App. 31a-65a). DCAA then appealed the Regional Office's decision to the Civil Service Commission's Board of Appeals and Review. The Board considered written submissions from both parties and upheld petitioner's discharge (Pet. App. 13a-30a).

Petitioner brought this suit for review of the final decision of the Civil Service Commission, arguing that the DCAA's decision to discharge him was arbitrary, capricious, and not supported by the evidence. After reviewing the administrative record, the district court granted summary judgment for the government, finding that petitioner had been granted all procedural rights to which he was entitled, and that the agency's decision was neither arbitrary nor capricious (Pet. App. 10a-12a). The court of appeals affirmed (Pet. App. 1a-9a).

2. There is no support for petitioner's contention (Pet. 8-17) that the court of appeals failed to review his dismissal to determine whether the agency's action was arbitrary and capricious. Quoting *Gueory* v. *Hampton*, 510 F. 2d 1222 (D.C. Cir. 1974), the court held (Pet. App. 6a-7a; footnotes omitted): "[w]e may determine only 'whether the decision to remove the employee was arbitrary and capricious,' * * *. These precepts compel affirmance in the instant case." Since both the court of appeals and the district court held that the agency did not abuse its discretion, there is no reason for this Court to review petitioner's claim (Pet. 17-26) that dismissal was too severe a penalty. See *Berenyi* v. *Immigration Director*, 385 U.S. 630 (1967).

Petitioner's contention (Pet. 26-29) that the agency's reliance on extra-record evidence deprived him of the opportunity to respond to the charges against him is insubstantial. As the court of appeals pointed out (Pet. App. 5a-6a & n.13), even assuming that the submission to which petitioner refers properly may be characterized as evidence rather than as a reply brief for the agency, any

procedural error was harmless since the administrative decision shows this evidence "played no apparent role in the Board's determination with respect to the six specifications it sustained."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

DOJ-1979-02